



# Dealing with Unemployment: Labour Market Policy Trends

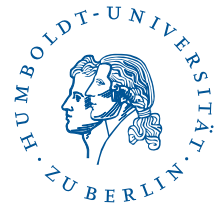
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Authors:

Tania Bazzani, Alexandre de le Court, Nelli Diveeva,  
Anja Eleveld, Stephan Klawitter, Reinhard Singer,  
Vincenzo Pietrogiovanni, Friedrich Preetz, Elena Sychenko

2018 Humboldt-Universität zu Berlin





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## Introduction

Unemployment benefits are crucial to addressing unemployment, but are not, in and of themselves, sufficient. Activation policies are also essential. These should enable the unemployed to become employable, i.e. ready to re-enter the labour market (LM). Yet the contractualization of social rights and the loosening of definitions of ‘suitability’ of job offer, as well as the exacerbation of sanctions, seem to be inspired more by the need to reduce public expenditure than by any desire to empower the unemployed. At the same time, any policy that takes only the supply side into account would seem insufficient to adequately promote employment. Moreover, boosting employment also depends on how the right to work is interpreted, and whether such interpretation implies the mere encouragement of employability on the supply side or, rather, the promotion of a macroeconomic policy aimed at full employment, according to which the qualitative dimension of working contracts and conditions count. Indeed, regarding the latter, the working conditions offered in the LM, as well as the flexibility applied within working relationships, should be taken into consideration in any attempt at addressing unemployment, as should the role of governments in providing welfare and activation. At the same time, the relationship between social and labour law in dealing with the current challenges of the LM should be highlighted, taking into consideration both their mutual influences and differing goals.

Thus, the contributions to this book map out possible links between social security protection and working conditions offered by the LM, and how such dimensions impact on each other and affect individuals’ lives.

The need for macroeconomic policy geared toward full employment, supported by adequate activation policies, as well as the need to assure people of a life lived in dignity, are two recurring themes in the authors’ contributions. These, in turn, concern both employment and social security law. Unemployment is one side of the coin, while the flipside comprises working conditions and working contracts offered by the LM.

Indeed, the higher the unemployment rate, the more likely the risk of working conditions offered under working contracts being eroded, and of the spread of non-standard work.

At the same time, the types of working contracts and the working conditions offered by the LM have a direct impact on social security protection provided to the unemployed: working contracts characterised by discontinuity create difficulty in fulfilling those eligibility requirements required to access insurance unemployment benefits. This also makes more likely the direct accessing of assistance, where it is offered by domestic systems. Together, working contracts that offer low wages reduce the amounts of insurance unemployment benefits, since these are calculated as a percentage of prior earnings. At the same time, unemployment benefits and assistance seem to be increasingly being utilised as tools to promote employment, notwithstanding that their social security goals are formally framed in terms of ensuring that lives are lived in dignity.

This book is divided into three parts. The first part is devoted to analysing the concept of “suitable job offer” and its possible effects on the individual’s circumstances. This part also provides an in-depth analysis of the links between sanctions and social rights, with a particular focus on the right to live in dignity.

The second part considers LM trends in terms of possible ways to characterise the right to work, and possible ways to develop working time as a feature of the working contract that can be used both to tackle unemployment and to improve worker health and safety, while also providing greater flexibility for both employers and employees.

The third part looks at the contractualization of social rights and its impact on LM institutions. It suggests some possible models for a more functional and effective LM and for a social protection system focused on improving individuals’ rights.

With regard to the first part, the increasing conditionality between social rights and activation duties requires unemployed people who access unemployment benefits or assistance to undertake activation duties. Thus, these unemployed must, for example, accept training and

mentoring activities offered by public employment services (PES) and, at the same time, accept any “suitable” job offer.

If precarious working contracts are characterised as “suitable” and thus must be accepted by the unemployed, and if they are actually offered increasingly by PESs, it will likely become increasingly difficult for the unemployed to access insurance social protection against unemployment, especially considering the often-stringent eligibility requirements (typically, a minimum period of work within a specific time frame prior to unemployment). This, in turn, will lead to conditions in which those who lose their job tend to be forced to re-enter the LM under precarious working contracts.

Moreover, the definition of suitability of job offer affects the circumstances of individuals in many additional ways. When an unemployed person refuses a suitable job offer, she incurs sanctions, i.e. postponement of benefit payments, reduction in the amount of benefits, and/or total benefit loss. Such consequences may have a direct impact on an individual’s right to a life of dignity, which social security systems must guarantee to citizens in accordance with domestic, European and international regulation.

Thus, one might question how far the law can push the beneficiary of an unemployment benefit to accept a job offer. The conditions under which a job offer is considered suitable are thus important, as is the question whether an unemployed person should be forced to accept any job offer in order to avoid having their benefits removed or reduced, or whether certain job offers may be refused.

Alexandre de le Court analyses the definition of suitable employment in three member states: Spain, The Netherlands, and Germany. In particular, he focuses on the relationship between precarious forms of work and the possibilities for reintegrating the unemployed into the LM, while also considering the risk of “precarious reintegration”.

Looking beyond the EU, Nelli Diveeva and Elena Sychenko look at the notion of “suitable employment” as defined by Russian legislation, in light of the Constitution of the Russian Federation and of international instruments. In particular, they consider special rules for specific groups

of people in the Russian LM, highlighting the discrimination profiles of the regulation.

Also taking an international perspective, Alexandre de le Court (in respect of the EU) and Nelli Diveeva and Elena Sychenko (in respect of Russia) consider the impacts of restrictive definitions of suitable employment on the right to work and on the choice of the beneficiary of unemployment benefits/assistance to choose the type of contract and the type of job, and consequent working conditions, as they re-enter the LM.

The concept of suitability of job also impacts on the social rights of the unemployed with respect to protection in case of unemployment. The transition from unemployment to employment is an EU goal, and through it the EU aims to actively include the unemployed in the LM. Thus, activation initiatives and social security protection are vital in supporting the unemployed to re-enter the LM. This approach is also applied to assistance, i.e. each person should receive adequate income support and, at the same time, such support should be applied in conjunction with activation initiatives to assist re-entry into the LM.

However, this relationship between activation policies and unemployment benefits or assistance in terms of minimum income should also be informed by the consequences, in terms of sanctions, for those beneficiaries who fail to comply with activation duties. Indeed, if activation initiatives or “suitable” job offers (as defined by the domestic legislation) are not accepted, even worse consequences than joblessness may affect the unemployed, i.e. loss of the economic support that would enable a life lived in dignity. In terms of assistance, leaving a person without economic support may violate the right to adequate minimum income benefits, which can be vital in ensuring lives are lived in dignity.

Anja Eleveld focuses on the relationship – as provided by the European Pillar of Social Rights – between the EU goal of inclusion in the LM and the protection of basic social rights. In particular, the author discusses how the minimum wage has been seen as a tool for expanding the scope of employment policies. Nevertheless, this expansion brings with it the risk of abandoning the social rights perspective, which should, on the contrary, be further strengthened if the European Pillar of Social Rights



is to be advanced. Further, Eleveld takes an interdisciplinary approach in analysing the link between tougher work-related sanctions and investment, in both social protection and activation policies, in most EU member states.

As discussed, the right to work can be viewed from a number of different perspectives: on one hand, as a social right and, on the other hand, as a way to deal with unemployment. These different dimensions are analysed in the second part by Vincenzo Pietrogiovanni, who focuses on the various definitions of the right to work, as well as the major restrictions upon it, highlighting the lack of its justiciability.

Depending on the perspective one takes, the bringing to bear of the right to work can be seen as a question of labour supply employment policy, to be achieved via the neoliberal approach of supporting employability policies. Yet from another standpoint, the right to work may be best realised through a macroeconomic policy aiming at full employment. At the same time, the quality of job offers must be considered in relation to the duty of the State – as it exists in many States and as stated as an EU goal – to promote macroeconomic policy geared toward the achievement of full employment. Thus, full employment should be regarded as a policy goal to tackle low-paid and precarious jobs, too.

In the transition out of and into the LM, hybrid possibilities also exist, including specific unemployment benefits compatible with specific ways of structuring working time. Working time, as an element of any working contract, plays an important role in shaping working conditions in the LM. Its regulation, and its combination with public benefits, can serve as a valuable tool in the redistribution of working hours between workers, and thus the avoidance of dismissals. Yet, at the same time, working time offers a means of protecting workers' health and security, and of achieving a healthy work-life balance. These aspects present a more challenging dimension at present, with digitalization eroding the boundaries between work and free time. Thus, if an unemployed person is forced to take on a duty to be available (to work and to accept suitable job offers), the worker must also assume a right to unavailability outside her regular working hours. The manner in which one frames these rights

may have a profound bearing on the characterisation of an individual's rights.

In this connection, in the second part of the book, Reinhard Singer, Stephan Klawitter and Friedrich Preetz focus on the distinctions between the categories of working time and rest periods. Rest periods should be granted without interruption, though this objective seems increasingly elusive in light of the opportunity afforded by digitalization to be online at all times. The authors illustrate some possibilities that could be offered by German legislators to mitigate the risks that constant availability pose to health and safety at work: indeed, the current Working Time Law seems to inadequately acknowledge the right to unavailability and the right to flexibility, both of which can be important tools for achieving a positive work-life balance.

Tania Bazzani deals with such dimensions of the working contract, too: health and safety protection for workers, and flexibility, for both employers and employees. In particular, she adopts a comparative perspective to focus on the role of both collective bargaining and public short-term work schemes. These aspects of working time may help provide flexibility and avoid dismissals. However, negative effects resulting from abuses of short-term work schemes are also highlighted.

With regard to the third part of the book, the conditionality between social rights and activation duties is analysed through the lens of contractualization of social rights. In this context, conditionality refers to the relationship between social rights and the duties of beneficiaries: sanctions are targeted at beneficiaries of unemployment benefits or assistance who do not comply with activation duties. Conditionality, in this form, reduces social rights to a *quid pro quo*, a kind of contractual relationship between citizens and the public administration. Despite criticisms of such an approach, the administrative reforms made last year by member states seem to have been squarely inspired by it.

Bazzani's contribution looks at the tendency toward such an approach in three specific member states: Italy, Spain, and Denmark. Although these three systems are characterized by normative and LM differences, common aspects of contractualization in active and passive LM policies

and recent reforms may be highlighted; these also affect the role of LM actors, such as PESs, social partners, and social security institutes. Moreover, as discussed by Bazzani in a further contribution, attempts at coordination and cooperation activities between public and private actors in the LM show how such actors can go beyond a mere contractualization approach or a merely-bureaucratic reciprocal relationship, instead achieving the kind of collaboration that leads to the achievement of common goals, including the fostering of social protection for the unemployed.

Berlin, 15 March 2018

Prof. Dr. Reinhard Singer

Dr. Tania Bazzani



## **Part I:**

# **Labour Market Policies, Activation and Welfare State**



**The obligation of unemployed to accept “suitable” employment.  
Continental Welfare States in a multilevel perspective**

Alexandre de le Court

**Abstract**

It could be said that one of the functions of systems of social protection in case of unemployment is to empower unemployed workers to refuse jobs which do not suit their expectations, even if only to a certain extent. On the one hand, those systems provide the right to partial replacement of previous wages. On the other hand, they involve the obligation for benefit holders to seek and accept employment defined as “suitable” or “adequate”. This work analyses the legal definition of the notion of suitable employment in Spain, The Netherlands and Germany, within the context of the regulation of more precarious forms of work, so as to explore the possible influence of the former on the pressure to reintegrate the labour market under precarious circumstances that unemployed can experience. It then reconstruct the legal definition under the perspective of its definition in international fundamental rights instruments and assesses how such a reconstruction can limit that possible “precarious reintegration” in the labour market.

**1. Introduction**

An important factor of the rise of non-standard work, and more generally, the degradation of working conditions, is unemployment. Higher levels of unemployment, and thus the existence of a greater “reserve army”, gives greater power to employers to hire workers on their own terms. Within this context, systems of social protection in case of unemployment play a function of empowering unemployed workers to refuse jobs which do not suit their expectations, even if only to a certain extent. On the one hand, those systems provide the right to partial replacement of previous wages. On the other hand, they involve the obligation for benefit holders to seek and accept employment defined as “suitable” or “adequate”. The content of the notion of “suitable” employment varies in function of the duration of the period of unemployment and the regime under which unemployment benefit holder fall. In the beginning, and generally in contributory regimes, the obligation only extends to searching and accepting employment requiring the same qualifications as the previous job and at the same salary level. After

a certain period of unemployment, and, generally, in assistential regimes, it can include any offered job which the unemployed can physically assume, whatever the type of contract, the content of the job or the salary.

Within this context, the present chapter is an attempt to explore the legal definition of the notion of suitable employment on the one hand, and how the conceptualization of the notion of suitable employment within the international social rights framework could contribute to guarantee the reintegration of unemployed within the labour market without this involving a degradation of working conditions or occupational status.

This chapter does not attempt to articulate a particular definition of precarious work, and does not pretend to contribute directly to its definition. Taking into account the complexity of the concept, its several dimensions and legal determinants,<sup>1</sup> it builds more on some of the expressions of those, like involuntary part-time employment, temporality of employment contracts, lack of access to social security or low earnings, without forgetting the gender perspective of the problematic.

Also, unemployment protection regimes have been recalibrated and put more emphasis on their activating character. The legal elements of activation have to be taken into account, as it is contented that they have an impact on the intensity of the obligation to search for or accept suitable employment. Different forms of activation (which could be ordered on a spectrum going from workfare measures to more positive, enabling or empowering measures) put the obligation to accept suitable jobs in a different context. The effectiveness of support measures or the control of the obligation, the availability of training and the legal conceptualisation of such aspects have an influence on the consequences of the notion of suitable employment on the circumstances of the reintegration of unemployed in the labour market.

The analysis of the notion of suitable employment in connection with the idea of precarious work gives a particular point of entry in the discussions and debates about the relation between unemployment protection and labour market regulation on the one hand, and on the debates about the content and meaning of fundamental social rights like the right to social security, or the right to work, which in their turn enrich the actual and potential applications of the notion of suitable employment as a limit to the commodification of workers through activation policies.

The analysis includes three models of unemployment protection, centred on three cases.

The Spanish case, where suitable employment is openly defined, but operates in a context of insufficient protection against unemployment, both

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<sup>1</sup> See on those aspects, N. Kountouris, "The legal determinants of precariousness in personal work relations: a European perspective", *Comparative Labour Law & Policy Journal*, Vol. 34, 2012-2013, 21-46



in its passive aspect as in connection with active labour market policies, and where protection against unemployment is also a factor of the unbalanced implementation of the flexicurity model.

The chapter then proceeds to the analysis of the legal definition of the notion of suitable employment in The Netherlands, as a model which is said to run along the idea of flexicurity and which has been the theatre of the shift of continental unemployment protection regimes towards a two-tier system (contributory and means-tested), with activation policies with an important work-first character.

The third model is the German unemployment protection system, inspired by the Dutch system but with shorter contributory unemployment benefits

The fourth part is an attempt to reconstruct the notion of suitable employment through its connection with fundamental social rights as defined in international social rights instruments, mainly the right to work and the right to social security. It tries to assess which could be the analytical and normative consequences of such a reconstruction on the interpretation of the legal conceptualization at national level of suitable employment in a way which could limit the reintegration of unemployed in the labour market under precarious forms of work.

## **2. The Spanish case: an open notion of suitable employment in a context of insufficiency of unemployment protection**

### **2.1. The notion of suitable employment: an open definition in the hands of the Public Employment Services**

The Spanish legal notion of suitable employment involves the application of several alternative functional criteria, combined with a geographical and an economic criterion.<sup>2</sup> Will be considered as suitable, the job which 1) corresponds to the habitual profession of the worker; 2) her training or physical skills; 3) her last occupation (if it has been exercised at least three months)<sup>3</sup>; or 4) her (implicit or explicit) request. As geographic criterion, the law states that the job cannot involve a change in habitual residence, except

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<sup>2</sup> Article 301 of the General Social Security Act (*Ley General de la Seguridad Social*)

<sup>3</sup> This period has however to be considered as too short, given the fact that, certainly in a situation of scarcity of employment, it is not uncommon to accept emergency occupations, due to pressing needs, but which finish to last more than three months, in which case the job seeker could see himself trapped in a professional itinerary which does not correspond to his capabilities or difficult his promotion through employment; see L. Mella Menéndez, *El Compromiso de Actividad del Desempleado*, Centro de Estudios Financieros, Madrid-Barcelona-Valencia, 99

if appropriate housing is available. As economic criterion, the law states that the new salary has to be the one applicable to the job in question.<sup>4</sup>

After receiving benefits for one year, will be accepted as adequate any job which the Public Employment Service considers “that the worker could exercise”. The slightly circular meaning of this new professional criterion and its undetermined character, whose application only depends on the lapse of time, brings serious difficulties regarding its interpretation. But the law also states the in assessing the suitability of the job offer, the PES will “take into account the duration of the contract, temporary or open-ended, or the working time, full-time or part-time”. Although the aggressive character of the initial wording in a Legislative Decree was played down in the final legislation (it mentioned that the adequacy had to be considered without regards to duration of the contract or working-time), the unemployed is again confronted to great legal uncertainty, not knowing towards which objective those elements have to be taken into account (protection of the unemployed or facilitating fast labour market reintegration), and, again, potentially augmenting the discretionary power of the Employment Services. This could be viewed as decreasing legal certainty, which could in its turn be considered contrary to the idea of “clear rights and responsibilities” of the unemployed, contained in the European Employment Guidelines.<sup>5</sup>

Some authors consider that this wording consecrates the fact that the duration of the contract or the fact that it would be part-time cannot be used as a valid justification to refuse a job offer, as already pointed towards by jurisprudence.<sup>6</sup> Others deem that the new wording compels the employment service to take into account the quality of employment and the characteristics of the contract in relation with personal circumstances in considering which job is adequate<sup>7</sup>. On the other hand, the obligation to accept part-time work should also be considered as contrary to its voluntary character, a principle which, should it be reminded, finds consecration in

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<sup>4</sup> The latter criterion should be considered as contrary to art. 10 of ILO Convention 44, to the extent that this provision defines the salary of reference in the sector as a subsidiary criterion, to be applied in the cases where tow other criteria could not be applied: the salary which the worker would have obtained if she would have continued to be employed in the same form, or could have obtained, given her habitual occupation, in the región where she was generally employed.

<sup>5</sup> Council Decision 2010/707/EU of 21 October 2010 on guidelines for the employment policies of the Member States, Guideline 7

<sup>6</sup> L. Mella Menéndez, *El Compromiso de Actividad del Desempleado*, Centro de Estudios Financieros, Madrid-Barcelona-Valencia, 117-118

<sup>7</sup> C. Molina Navarrete, “El concepto de “colocación adecuada”: “profesionalidad” versus “empleabilidad” del trabajador”, *Tribuna social: Revista de seguridad social y laboral*, nr 143, 2002, 19; R. Cristóbal Roncero, “El programa de renta active de inserción en la Ley 45/2002”, in A.V. Sempere Navarro, (coord.), *Empleo, despido y desempleo tras las reformas de 2002 (Análisis de la Ley 45/2002, de 12 de Diciembre)*, Aranzadi, 2003, 285

Directive 97/81/CE on Part-Time Work<sup>8</sup>, even if the applicability of the latter on the case at hand is not direct.

In any case, an important element is that the public employment services has to apply all the aforementioned criteria, “taking into account the personal and professional circumstances of the unemployed, his insertion itinerary, his work-life balance, the characteristics of the job offer, existence of transport as well as the characteristics of the local job markets”. This broadening of criteria, on the one hand, gives a lot of discretion to the employment services in determining if a job has to be considered adequate. On the other hand, it provides for legal elements which should permit the courts to review the decision of the employment services, by allowing them to take into account the circumstances of the case (and, admittedly, decide in favor of the freedom to choose one’s occupation that the right to work should entail).

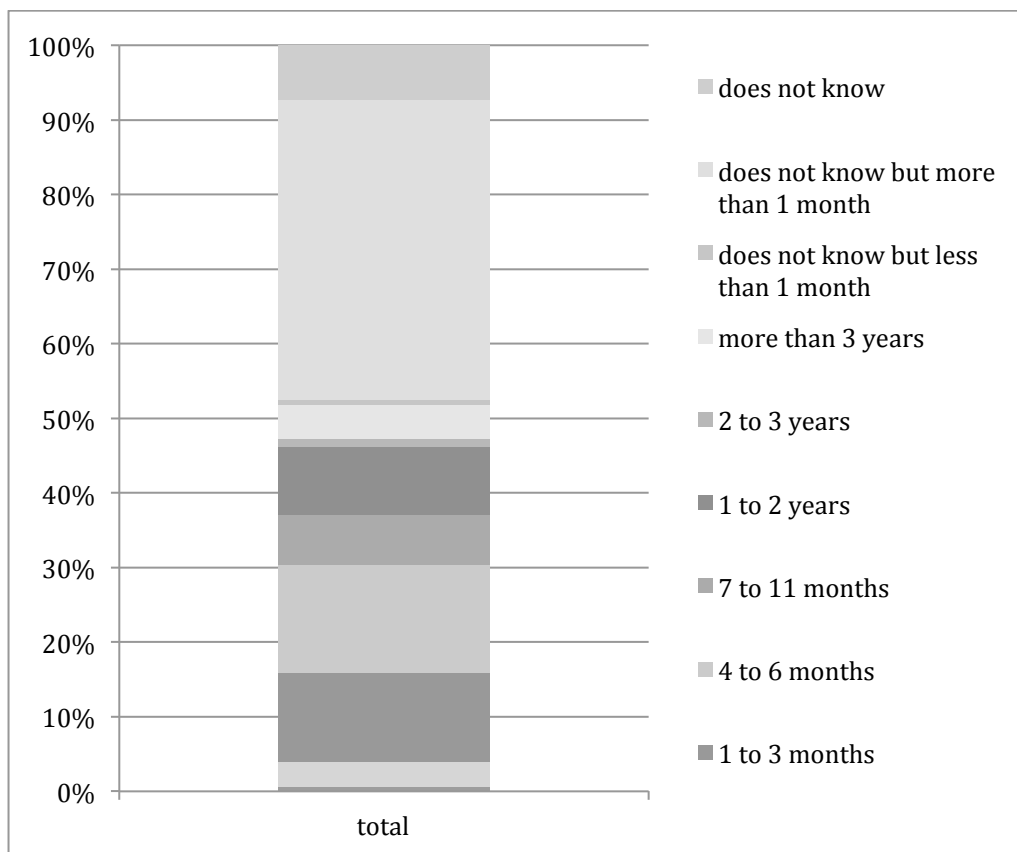
## **2.2. Suitable employment in a context of “flexiprecarity”<sup>9</sup>**

As we have seen in the previous section, the notion of suitable job does guarantee that an unemployed is prevented to have to accept atypical employment like fixed-term or part-time work. In this context, it is important to underline that more than 90% of the currently created employment in Spain has a temporary character. According to EUROSTAT, the temporary employment rate for 2016 revolves around 26% (for 23 % in 2012). Moreover, a great part of those fixed-term contracts have a very short duration.

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<sup>8</sup> S. de la Casa Quesada, *La protección por desempleo en España*, Comares, Granada, 2008, 127.

<sup>9</sup> The term refers to the unbalanced implementation of the idea of flexicurity in Spain, where contracts have been flexibilised without that “security” of workers, through unemployment protection and enhancement of their employability, has been reinforced. On this subject, see J. López, A. de le Court, S. Canalda, “Breaking the equilibrium between flexibility and security: flexiprecarity as the Spanish version of the model“, *European Labour Law Journal*, 2014, vol. 5, nº 1, 19-43.



*Source: own elaboration from the online database EPA from the Instituto Nacional de Estadísticas (Asalariados con contrato o relación laboral temporal por duración del contrato, sexo y grupo de edad, 4<sup>th</sup> trimestre 2017)*

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n this context, it is important to point out that in the case of the acceptance of a new job, the right to contributory benefits is not ended, but suspended for one year, in case the worker would lose its job in the meantime.

Also, in the Spanish context, part-time work can be clearly seen as a precarious form of work. Part-time work has a problematic definition, according to which any employment contract with a number of hours inferior to a full-time contract of comparable worker is a part-time contract, and the fact that proportionality of access to social security rights automatically applies, and makes their access more difficult.<sup>10</sup> Part-time

<sup>10</sup> J. López López, C. Chacartegui Jávega, C. and C. González Cantón: "Social Rights in Changing Labor Markets: Caring for Caregivers in the European Union", in K.W. Stone

work also involves the application of strict proportionality criteria, even to minimum benefits.

Also, while the Spanish law guarantees in principle the voluntary character of part-time work, also in application of the EU Directive on Part-time work, the proportion of involuntary part-timers has started to increase since 2004, before soaring with the crisis. According to EURES, in 2016, 7.7% of employees has to be considered as underemployed part-time workers (with an EU average of 4.3%). As part-timers form around 15% of the Spanish employees, this means that more than half of part-time work is involuntary. This new phenomenon of the Spanish labour market has, again, to be read as a new trend of re-commodification, both in-work as out-of-work, because of its consequences on access and level of unemployment benefits. Moreover, involuntary part-time work, also to be described as “underemployment”, is a form of “disguised” unemployment. It is also an important factor of in-work poverty, especially for the young.<sup>11</sup>

Also, despite being characterized as problematic by European authorities in the context of the Employment Strategies,<sup>12</sup> the Spanish trend of recourse to fixed-term work initiated in the precedent decade has never been reversed. Only the 2008 crisis decreased the temporality rate, given that fixed-term worker bore the burden of job destruction. Some timid measures had been introduced before the crisis, above all in terms of subsidies for the promotion of conversion into open-ended contracts and the promotion of exceptional, open-ended contracts with lower compensation in case of dismissal, but not in terms of changes in the legal configuration of fixed-term contracts, except the introduction of limits to their “chaining” and an “absolute” limit of three years. However, in the wake of the crisis, the introduced limits were suspended, and the 2012 labour law reform did nothing else than rely on lowering protection of open-ended contracts, to try to revert the trend, without results.<sup>13</sup>

Again, this has negative consequences in terms of entitlement to the right to unemployment protection, due to the contributory character of the latter and

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and H. Arthurs, (ed.) *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment*, New York, Russell Sage Foundation, 2013, 333–349.

<sup>11</sup> European Commission, “Is Working enough to avoid Poverty? In-work Poverty Mechanisms and Policies in the EU” in *Employment and Social Developments in Europe 2011*, 145

<sup>12</sup> Recommendation for a COUNCIL RECOMMENDATION on Spain’s 2014 national reform programme and delivering a Council opinion on Spain’s 2014 stability programme, SWD(2014) 410 final

<sup>13</sup> J. López, A. de le Court, S. Canalda, “Breaking the equilibrium between flexibility and security: flexiprecarity as the Spanish version of the model”, *European Labour Law Journal*, 2014, vol. 5, n° 1, 19-43. Moreover, according to Chapter 2 of the OECD Employment Outlook 2013, p. 97, regulation of temporary contracts has been flexibilised, mainly by lengthening their maximum duration.

the greater difficulties to fulfil the requisites of sufficient contributory periods for persons working in fixed-term contracts. The high temporality rate has also a negative effect on the precarization of workers and their employability<sup>14</sup>, and, at least in the Spanish context, specifically on their employment chances<sup>15</sup>, which are also a consequences of the higher in-work commodification fixed-term work involves.

Within this context of important precarisation of workers in temporary and part-time contract, and the high in-work commodifying level of the latter, the possibility to consider those types of contracts as suitable employment, given the legal definition, can be seen as quite high.

Another important feature of the Spanish labour market which is problematic from the point of view of forcing workers back in the labour market through the broadening of the notion of suitable employment, is the low level of wages, and above all of the minimum wage.

Here again, an important element of precariousness arises, as pointed out by the European Committee on Social Rights:

“In its previous conclusion (Conclusions XVIII-2) the Committee held that the minimum wage was manifestly inadequate as it fell far below the threshold of 60% of the average wage. It also requested detailed information on net values of both minimum and average wages.

The Committee notes from the report that on the basis of the Royal Decree 1632/2006 of 29 December the minimum interprofessional wage was fixed at € 570,60 per month. It rose to € 624 in 2009 by virtue of the Royal Decree 2128/2008 of 26 December. The Committee however observes that the report, again, fails to provide information as requested on the net values of minimum and average wages. It notes from Eurostat that the average annual gross earnings in 2007 amounted to € 21,890 in 2007 (€ 1,824 per month). Therefore, even in the absence of information on the net values, the Committee considers that despite the growth of minimum wage, the situation remains unchanged - the level of the minimum wage remains very low and thus not fair. The Committee also notes from OECD that minimum relative to average wages of full-time workers in 2007 amounted to 45%.

Conclusion

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<sup>14</sup> J. López, A. de le Court, S. Canalda, “Breaking the equilibrium between flexibility and security: flexiprecarity as the Spanish version of the model”, *European Labour Law Journal*, 2014, 2014, vol. 5, n° 1, 19-43

<sup>15</sup> J. Polavieja, “Partial deregulation in Spain: more cons than pros”, *Working Paper* 2003/195, Centro de Estudios Avanzados en Ciencias Sociales, Madrid, 2003

The Committee concludes that the situation in Spain is not in conformity with Article 4§1 of the Charter on the ground that the minimum wage is manifestly unfair.”<sup>16</sup>

Given that minimum wage has been frozen during the last years, it could not be said that the situation has evolved favourably, with the exception of the last year, which saw an increase of the minimum wage to 707,6 €. In 2016, according to EUROSTAT, minimum wage represented 36% of the gross average wage.

This has also an importance as to the sufficient character of unemployment benefits, given their close connection to previous earnings, and poses into question, not only the sufficient character of a great part of the wages, but also of social protection benefits.

On the other hand, within the Spanish context, the importance of the discussion about the strictness of the notion of suitable employment and its effects on the growth of precarious employment has to be downplayed somewhat, and this among others, for the following reasons.

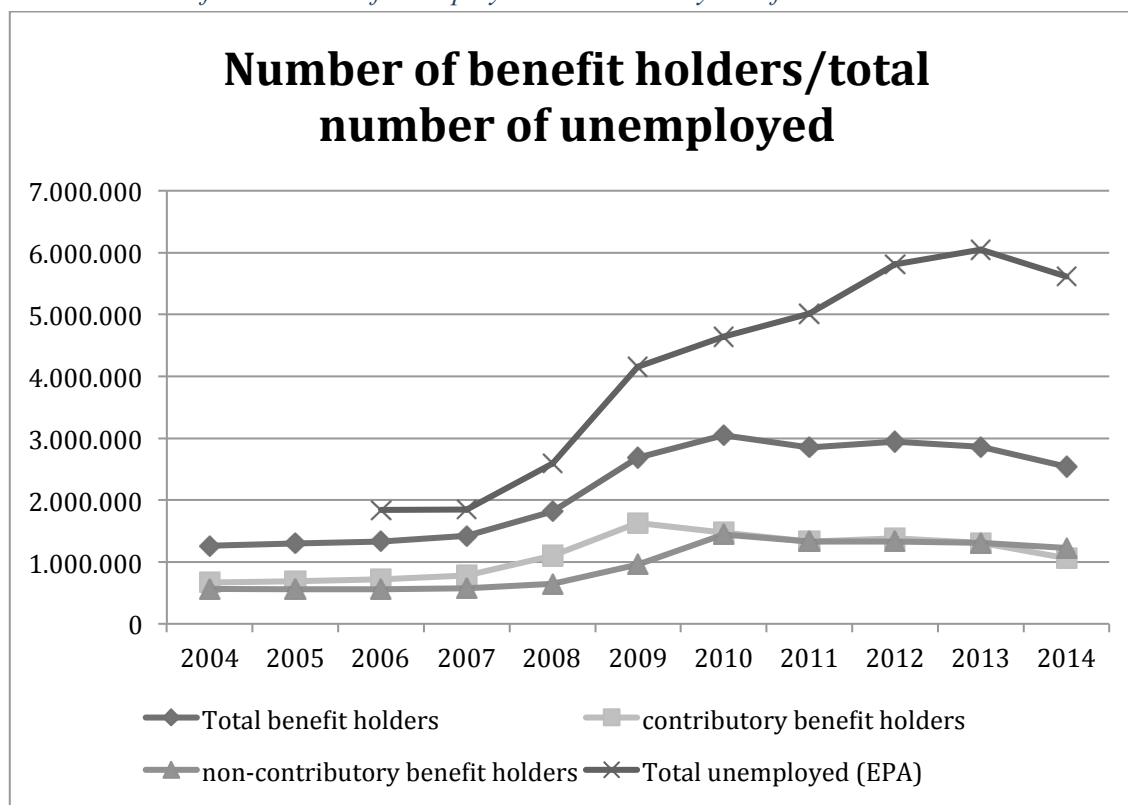
Firstly, the obligation to accept suitable employment only applies to unemployed perceiving contributory or non contributory benefits. However, because of the growth of long-term employment, combined with stricter entitlement conditions and the lack of a universal, means-tested, subsidiary protection scheme for those running out of contributory benefits<sup>17</sup>, like in most other continental welfare states, almost half of the unemployment population does not perceive any benefits, whether they can appeal to family solidarity or not. Only 3% of those unemployed have access to regional social assistance schemes, most of which (except the Basque Country or in Navarra) are not configured as subjective rights, depending on the availability of fixed budgets, have very strict access thresholds, do not provide for sufficient resources or even exclude applicants whose situation of necessity is only due to their being unemployed. In any case, those unemployed not covered by benefits, even if they theoretically have access to ALMPs and PES, are not subject to an obligation to accept suitable jobs, are not prioritized in those offers, and are compelled to accept any job out of sheer necessity.

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<sup>16</sup> Conclusions XIX-3 – Spain – Article 4-1, 2011

<sup>17</sup> Non-contributory benefits are only available to unemployment older than 45 years with family at their charge, whose household income do not pass the threshold.

*Evolution of the number of unemployed not covered by benefits 2004-2014*

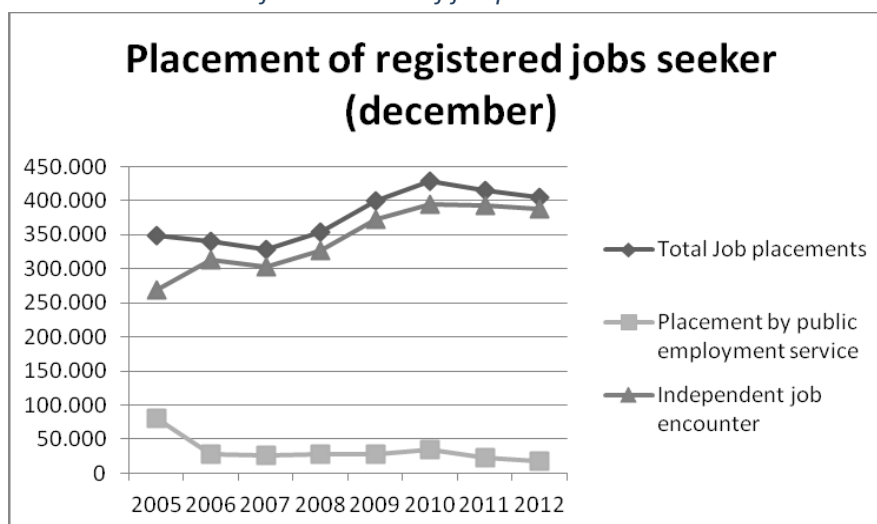


Source: own elaboration from Employment Ministry Database (Prestaciones por Desempleo) and Encuesta de Población Activa (2015)

Secondly, one has to take into account the important degree of ineffectiveness of Spanish PES in placing unemployed (and thus, offering suitable employment).



*Evolution of the number of job placements 2005-2012*



Source: own elaboration from the online database *Estadísticas Laborales* (Spanish Ministry of Employment) 2012

The overwhelming majority of unemployed find a job by their own efforts or through other placement systems, and efficacy of the public employment service seems even to dwindle further from the year 2010 onwards.<sup>18</sup>

It is against this background that the recent Spanish reforms concerning ALMPs have been oriented towards privatizing the functions of the PES, by opening them to private employment agencies, most of them being also temporary work agencies, not only concerning orientation and placement of job seekers, but also other aspects of support measures, like training.<sup>19</sup> The

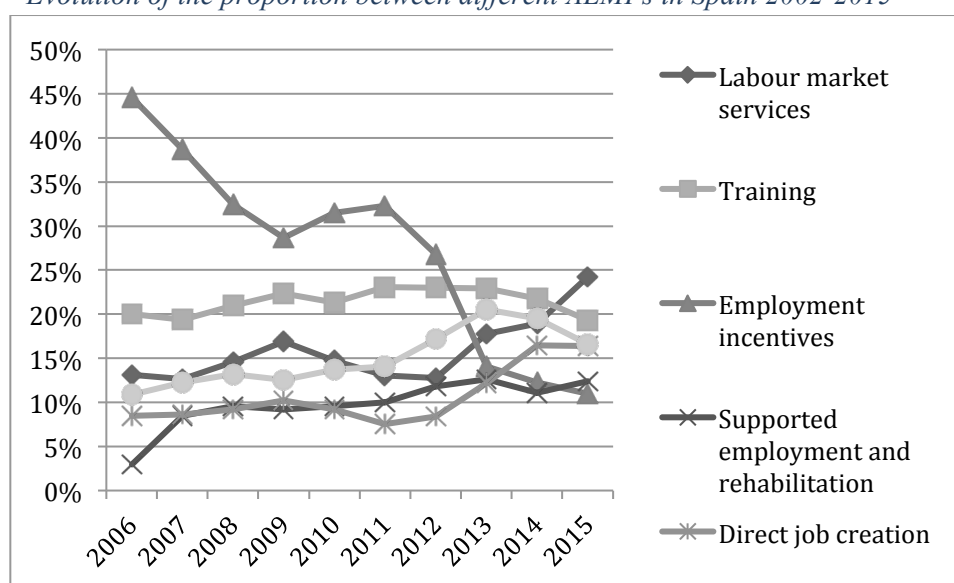
<sup>18</sup> While in 1992, taking into account the whole labour force of the unemployment administration, the ratio of unemployed per PES workers was 191, one of the lowest of the OECD, in 2010 it amounted to 208, moreover in a year which had seen increased the numbers of PES workers to face soaring unemployment, but which subsequent cuts certainly have not bettered, to the contrary. If we extrapolate the increase between 2007 and 2010 of the workers of the national PES to the workforce of all Spanish PES (22,6%), we arrive to a ratio in 2007 of 107 unemployed per PES worker. It seems thus, within the approximate character of the data and method used, that the situation might have improved slightly at the best, but certainly not to join the 1992 ratios of Germany (39), France (79), the Netherlands (32) or even a country whose Welfare State model is closer to the Spanish one, like Portugal (51). Moreover, we could assume that those foreign 1992 ratios have bettered under influence of ALMP extension. Own elaboration from the SEPE website ([http://www.sepe.es/contenido/estadisticas/datos\\_recursos/index.html](http://www.sepe.es/contenido/estadisticas/datos_recursos/index.html)), and INE (EPA); see also [http://www.fsc.ccoo.es/comunes/recursos/99922/361352-Cuadro\\_resumen\\_con\\_evolucion\\_en\\_los\\_cinco\\_ultimos\\_anos..pdf](http://www.fsc.ccoo.es/comunes/recursos/99922/361352-Cuadro_resumen_con_evolucion_en_los_cinco_ultimos_anos..pdf);

<sup>19</sup> Ley 11/2013 de 25 de julio de medidas de apoyo al emprendedor y de estímulo al crecimiento y de la creación de empleo, 32nd additional disposition; Real Decreto-ley

public tenders to externalize those functions involve a remuneration of those agencies in function of re-integration of job-seekers for at least 6 months, introducing this limit in the formalization of what might be considered as “durable” integration. Those tenders also involve remuneration of those agencies in case they provide the information to PES permitting those to sanction unemployed, involving a publicly remunerated private control on the acceptance, amongst other aspects, of suitable employment. Again, it should be reminded that it would be mainly unemployed receiving benefits which would be diverted by the PES to those private agencies for their reintegration.

This aspect of lack of effectiveness of PES also has to be connected with the more general structure of Spanish ALMPs.

*Evolution of the proportion between different ALMPs in Spain 2002-2015*



Source: own elaboration from EUROSTAT, 2018 (expenditure on LMP)

Employment incentives have traditionally represented the biggest part of Spain's ALMP's budget, despite the fact that almost all studies point towards very poor macro- and micro-economic effectiveness of those hiring subsidies in terms of employment creation, generally pointing towards deadweight effects, (the hiring would have occurred also without the subsidy) with some very particular and limited exceptions in case of small,

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8/2014, de 4 de julio, de aprobación de medidas urgentes para el crecimiento, la competitividad y la eficiencia;

well-targeted groups, or substitution effects (a worker is replaced by a subsidized worker)<sup>20</sup>. They include mainly hiring subsidies, as well as subsidies officially classified as “for the maintenance of jobs”. However, the latter category is referring mainly to subsidies for substitution or job adaptation in matters of maternity risks and leave, and, since the crisis, to short-term work schemes of temporary contract suspensions<sup>21</sup> (scheme that was limited to the end of 2013). It is also important to state that the category “training” does not only include training for unemployed but also training for workers in employment. Moreover, even if the importance of those “incentives” declined over the years, it seems that the measures taken following the crisis have broken that trend, mainly through an increase in relative terms of the recourse to hiring subsidies (as argued here above) combined, from 2012, with a decrease in the proportion of the budget dedicated to training, the relative position of which stabilized in 2013 but decreased again in 2014. On the other hand, the general budget of ALMP has passed from 8.956.710.000 € in 2010 to 6.401.840.000 € in 2015.<sup>22</sup> Thirdly, there is very few, if almost any, data concerning the application by the PES of the notion of suitable employment, whether taking into account sanctions related to the refusal of a suitable job offer, or other data. This

<sup>20</sup> J.P. Martin, D. Grubb, “What works and for whom: a review of OECD countries' experiences with active labour market policies”, *IFAU Working Paper*, 2001:14, <http://www.ifau.se/upload/pdf/se/2001/wp01-14.pdf>; J. Boone, J.C. van Ours, “Effective Active Labour Market Policies”, *IZA Discussion Papers*, 2004 I. Marx., “Job subsidies and cut in employers' social security contributions: the verdict of empirical evaluations studies”, *International Labor Review*, n°1, 2001, 69 ; A. Ammermüller, T. Zwick, B. Boockmann, and M. Maier, “Do hiring subsidies reduce unemployment among the elderly? Evidence from two natural experiments”, *ZEW Discussion Papers*, No. 07-001, 2007, <ftp://ftp.zew.de/pub/zew-docs/dp/dp07001.pdf>; ILO, *The youth employment crisis: Time for action*, Report V in the context of the 101<sup>st</sup> session of the International Labour Conference, Geneva, 2012, 58-59; for the Spanish case, see D. Pérez del Prado, *Los instrumentos económicos de fomento del empleo*, Tirant lo Blanc, Valencia, 2011, 101-104; F. Saez, “Políticas de empleo y su evolución en España”, and C. García Serrano, “Los resultados de las políticas activas de Mercado de trabajo en España. Evidencia empírica disponible”, both in VV.AA., *La evaluación de las políticas de ocupación*, Ministerio de Trabajo y Asuntos Sociales, Madrid, 2000;

<sup>21</sup> It is important to observe that those systems, inspired from the German *Kurzarbeit* but not as developed as the latter, involves a transfer of business risks from the company towards the state, or more precisely, towards passive unemployment protection (payments of benefits) on the one hand, but also towards the workers, as during the suspension, they “consume” the rights to insurance benefits that they have generated. The exceptions to that “consumption” in a form of a replacement of a maximum 6 months of benefits, will only apply in case of suspension plans approved before the end of 2013, and only in case of unemployment following dismissal on economic, organization or production grounds before the end of 2014, excluding termination of temporary contracts or dismissals on other grounds (Article 16, *Ley 3/2012, de 6 de julio, de medidas urgentes para la reforma del mercado laboral*)

<sup>22</sup> EUROSTAT, expenditure on LMP (2018)

might also be explained by the fact that, with a job market characterized by high structural unemployment figures, which have soared with the job destruction and measures taken in the wake of the crisis, without giving signs to be significantly reduced in the years to come.

There are almost no official numbers or databases concerning the patterns of sanctions, other than press releases from the government. In 2010, Spain counted around 3 million benefit holders. The proportion of sanctioned benefit holders would thus be 8,7% in total, and 0,2% for serious offence (of which refusing suitable employment would be one. When looking at the published jurisprudence (generally appeal-level decisions), the greatest part deals with problems surrounding sanctions or extinctions related to movement of unemployed out of the country, with questions concerning the computing of income to access assistance benefits coming second, and the rest of the most important groups of judgements concerns recognition of unemployment benefits in case of partial unemployment, and sanctions concerning the refusal of job offers.<sup>23</sup>

However, concerning the latter, disputes are generally about other subjects than the refusal to accept a proposed job offer because of the employment precariousness it would involve. However, one of the main judicialised aspects of the matter is the refusal by unemployed women of jobs for reasons of care. However, apart from a few recent exceptions,<sup>24</sup> the jurisprudence of the *Tribunal Supremo* is quite strict, as it generally considers that the need for care is not a justified ground to refuse a job offer, as the rights related to care have to be exercised in the context of the labour contract (something which is made more difficult with the last labour

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<sup>23</sup> Analysis based on keyword searches („sanction“ and „unemployment“) in the online database „Aranzadi bibliotecas“.

<sup>24</sup> The *Tribunal Superior de Justicia de Galicia*, court of appeal in social matters, decided in a judgment of 4 April 2005, AS 2005, 1460, 1) that the refusal to participate in training had to be assessed under the same circumstances as the refusal of an adequate job offer, as the PES have to take into “account the personal and professional circumstances of the unemployed, his insertion itinerary, his work-life balance, the characteristics of the job offer, existence of transport as well as the characteristics of the local job markets” for all the obligation of the unemployed; and 2) that a worker having refused to participate in training because the participation would make it impossible to care for his child, because his wife was also following training, could not be sanctioned. More interesting even, the Court reinforced its interpretation by referring to ILO Convention 44 and, above all, ILO Recommendation 165, according to which family responsibilities of the unemployed have to be taken into account in the assessment of the suitable character of employment. To justify the reversal of jurisprudence in comparison to the criteria established by the *Tribunal Supremo*, followed by the jurisprudence commented in section I.1, the Court argued that the principle of the promotion of work-life balance, since the Law 39/1999 of 5 November of promotion of work-life balance of workers,<sup>24</sup> modifying disposition of labour law and social security law, is to be seen as a general criterion of interpretation in labour and social law

reforms and the growing pressure put on workers by employers). This consideration also connects with the gender related aspect of the problematic.

### **3. The Dutch case: a notion of suitable employment under a model evolving along the idea of flexicurity**

#### **3.1. A work-first model based on the restriction of the notion of suitable employment**

At the end of the eighties and during the nineties The Netherlands, through the *Werkloosheidswet* (WW) put in place a system of contributory unemployment protection consisting in a replacement wage of 70% of previous wages, with a duration in proportion to previous contribution periods and a maximum duration of 5 years, which was reduced in the first decade of the XXIst century to 38 months, and will further be reduced to 24 months by the 2014 *Wet Werk en Zekerheid* (with the possibility that the reduction can be compensated through collective agreements).

Until the 2014 reform, the notion of suitable employment which had to be accepted by unemployed had been defined in non-legally binding, but widely applied Guidelines. The interpretation of the notion had to be based on three factors: the characteristics of the work (which are primarily assessed in function of the previous job and qualifications), the level of salary and duration of travel. The strictness of the interpretation of those three factors depends on the duration of unemployment. As such, for example, every six months a worker had to accept a job from a lower educational category, which means that after a year and a half, persons with a higher education degree were to accept also jobs not requiring any qualifications. After 6 months, lower salaries should be accepted, corresponding to jobs of the lower educational category which have to be accepted, with minimum salary and applicable collective agreement salaries considered as minima.<sup>25</sup> The suitability would also depend on the availability of jobs in the sector of the previous work, so that in case of high general, sectorial or local unemployment, suitability would be more broadly interpreted. The latter is an important expression of the re-commodifying character of how return-to-work is framed, as it is a feature that depends heavily on the necessities of the employers and the situation of the labour market, rather than on characteristics on which the unemployed has (had) at least some control (qualifications,...).

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<sup>25</sup> Richtlijn Passende Arbeid 1996 (replaced in 2008) <http://www.st-ab.nl/abwor57.htm>

In 2008, new (non-legally binding but widely applied) Guidelines on the notion of suitable job were published, allowing wider interpretation, in detriment to the benefit-receiver. As such, any job had to be considered suitable (even if it does not match the level of the precedent job) after 52 weeks of unemployment, instead of the former year-and-a-half. Moreover, after those 52 weeks, it was also considered that a job had to be considered suitable, even if the salary was lower than the level of benefits, due to the fact that, in case of long-term unemployment, the new system permitted to top the new salary with partial benefits so as to match the former benefit level.<sup>26</sup> Before this period, the salary limit to a suitable job is fixed at the level of the type of work which has to be accepted in function of the qualifications (every 6 months, this lowers by a category – there are 4 categories, from higher education to no qualifications –<sup>27</sup> with the level of benefits as a limit, and work of a temporary character has to be accepted.<sup>28</sup> It is worth to note that the European Committee of Social Rights has concluded to a situation of non-conformity with art. 12-1 of the European Social Charter, given the lack of information the Dutch government has given concerning the question “whether there is a reasonable initial period during which an unemployed person may refuse a job or a training offer not matching his/her previous skills without losing his/her unemployment benefits”,<sup>29</sup> which would lead us to think that the actual period could be deemed unreasonable.

Finally, with the 2014 reform, after 6 months of having received unemployment benefits, the notion of “suitable job” will imply “any job which suits the capacities and qualifications of the worker”, which would mean that jobs according to lower qualifications as well as salary will have to be accepted. On the other hand, the notion itself has not been altered, and still provides for social, physical and mental grounds to consider unsuitable employment which would be considered, in principle, suitable. Also it could be reasonably assumed that previous jurisprudential or other criteria on assessing the notion of suitable employment after 6 months, like the probability in case of accepting employment at a lower qualification level to

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<sup>26</sup> G. Vonk and W. Zondag, “Passende arbeid: nog steeds een levend begrip?”, *Serie Onderneming en Recht*, 50 (2009), <http://irs.ub.rug.nl/ppn/353590924>

<sup>27</sup> Richtlijn passende arbeid 2008, available at <http://www.st-ab.nl/wetwworlrpa08.htm>

<sup>28</sup> Inspectie Werk en Inkomen. Ministerie van Sociale Zaken en Werkgelegenheid, “Flexibele arbeid en uitstroom”, Report, November 2011, [https://www.inspectieszw.nl/Images/Flexibele%20arbeid%20en%20uitstroom\\_tcm335-327742.pdf](https://www.inspectieszw.nl/Images/Flexibele%20arbeid%20en%20uitstroom_tcm335-327742.pdf)

<sup>29</sup> European Committee of Social Rights, Conclusions 2013, The Netherlands, [http://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/State/Netherlands2013\\_en.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/State/Netherlands2013_en.pdf)

come back to employment corresponding to the qualification of the worker (important to prevent degradation in employment) could still be applied.

But the notion of “suitable job” during the first 6 months of unemployment will not be interpreted any more according to non-binding guidelines (which established that suitable job meant a job of the same level as the previous job), but will be defined by a government regulation,<sup>30</sup> roughly defining suitable employment as an employment corresponding to the level of the previous employment, and not involving earning less than 70% of the previous salary or of the comparable salary for that occupation.<sup>31</sup>

In 2007, the obligation of unemployed to look for work, contained in the law, has been detailed in a Governmental regulation,<sup>32</sup> which putted forward the principle of “the shortest way to work”. It discerned between unemployed “close” to the labour market, which had an obligation to sufficiently look for work and accept invitations to job interviews, and those “further” from the labour market, for which reintegration activities like training, workshops and voluntary work had to be combined with job interviews, under the supervision of a “reintegration coach”.<sup>33</sup> The PES distributed unemployed between the two groups and took into account their potential and limitations, the situation of the job market, the number of job vacancies and the notion of suitable employment in deciding the reintegration measures. From 2007, agreements on the concrete execution of those obligations were compulsory. The regulation was replaced in 2012, when the separation between unemployed “closer to” and “further from” the labour market has been abolished, all unemployed having the same obligation to look for work. Some violations, mostly those related to the obligation of information, are sanctioned by a fine in function of the gravity and the circumstance of the case.

Those unemployed not having access to contributory benefits for lack of previous contributory periods or because the period of contributory benefits has expired, have access to the means-tested social assistance scheme,

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<sup>30</sup> Besluit van 11 december 2014, houdende nadere regels omtrent het begrip passende arbeid zoals genoemd in de artikelen 24, derde lid, van de Werkloosheidswet en 30, vijfde lid, van de Ziektewet (Besluit passende arbeid WW en ZW)

<sup>31</sup> According to the memorandum to the Project Wet Werk en Zekerheid, 94, as a “compensation” for the latter measure, the system which provided for the payment of benefits for the difference of working hours between the previous and the new job to be accepted, or “hours compensation system”, is replaced by one of “compensation of remuneration”, similar to the system already in place for long-term unemployed. This means that, upon accepting a job with a lower salary, 70% of the difference between the new and the previous salary will still be paid out as unemployment benefits, on top of the new salary, for the rest of the duration of benefits

<sup>32</sup> Besluit sollicitatieplicht werknemers WW 2007

<sup>33</sup> A.C. Damsteegt, *De Werkloosheidswet anno 2007*, Kluwer, Deventer, 2006, 56-57

administered by the municipalities and regulated by the 2003 *Wet Werk en Bijstand* (WWB – Work and Assistance Act).<sup>34</sup>

Instead of a “suitable” job, reflecting the obligations of unemployed under the WW, unemployed falling into the assistance scheme (or, generally, any person claiming social assistance) have now the obligation to try to obtain “generally accepted work”, a notion which in contrary to Dutch legal practice, has not even received a beginning of legal definition. In application of the individualization principle of social assistance it shall be applied, interpreted and substantiated (as well as temporary exceptions given) at the level of municipalities.<sup>35</sup>

Parliamentary discussion of the notion did not offer more light on the concept than that it would imply the severance of the link between the job and qualifications, as well as the consideration as not generally accepted work of prostitution, work in illegal conditions and below the minimum wage, or work that goes against the worker’s legitimate moral objections, without totally ruling out personal circumstances. This means that for those unemployed, the notion of suitable employment could be seen to have been degraded to a notion of mere “legal employment”. Moreover, studies show that the concept is overwhelmingly used as means of pressure to accept any job that is offered to the benefit claimant, independently of individual circumstances, underlining the “work-first” character of the Dutch unemployment protection schemes.<sup>36</sup>

The changes in the social assistance system introduced in the first decade of the XXIst century did not really have effects on the number of payments of benefits, which continued to vary more in function of overall economic performance. This confirms that the scheme has served to absorb unemployed who have run out of insurance benefits. Financial incentives for municipalities for lowering the numbers of benefit holders had some influence on limiting entries to the scheme, but other schemes, like benefits for young disabled persons, saw an increase in beneficiaries, which suggests another movement of absorption. Also, the work-first approach, reinforced by those same financial incentives, made that a relatively high percentage of

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<sup>34</sup> Wet van 9 oktober 2003, houdende vaststelling van een wet inzake ondersteuning bij arbeidsinschakeling en verlening van bijstand door gemeenten

<sup>35</sup> E. Sol, M. Sichert, H. van Lieshout, and T. Koning, T., “Activation as a Socio-Economic and Legal Concept: Laboratorium the Netherlands” in W. Eichorst, O. Kaufmann, R. Konle-Seidl, *Bringing the Jobless into Work. Experiences with Activation Schemes in Europe and the US*, Springer, Berlin-Heidelberg, 2008, 184

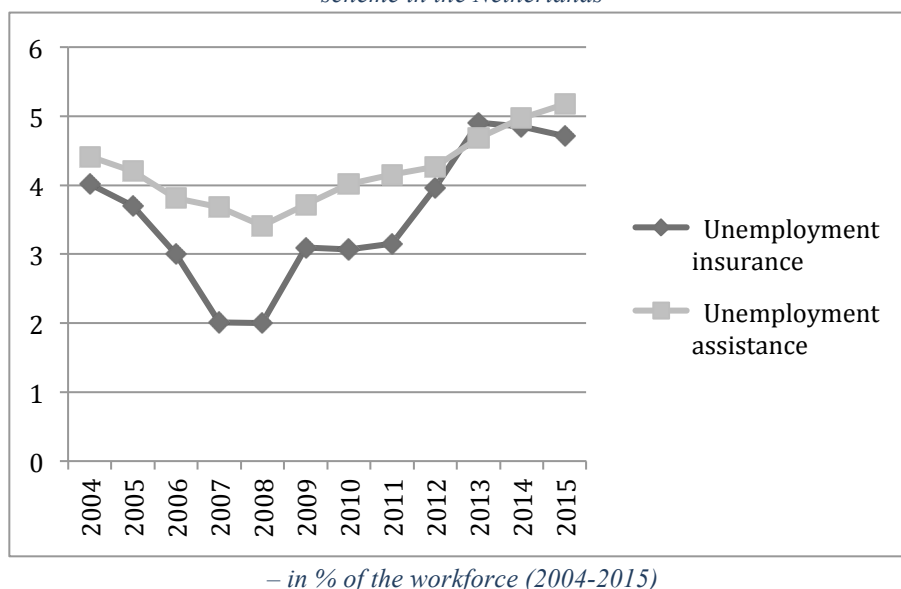
<sup>36</sup> G. Vonk, and W. Zondag, “Passende arbeid: nog steeds een levend begrip?”, *Serie Onderneming en Recht*, n<sup>o</sup>, 50, 2009



persons returned to the scheme after employment, with no real increase in durable work participation.<sup>37</sup>

Moreover, the following graph shows that the proportion between unemployed within the contributory scheme and the assistance scheme, while being quite similar in the beginning, evolved into an ever higher part of unemployed in the assistance scheme. The gap closed with the beginning of the crisis, suggesting that the contributory scheme absorbed a great part of job losses in a first phase, but after that, it started widening again.

*Evolution of Unemployed in contributory and non-contributory unemployment scheme in the Netherlands*



Source: own elaboration from the OECD online database 2018 (participant stock on LMP)

This might have been produced by the ever stricter limitation of maximum duration of the contributory system, as well as a generally higher qualifying periods for which the average maximum duration of benefits has decreased.<sup>38</sup> In 2007, 25% of new unemployed had right to a maximum duration of benefits of 6 months, 15% between 6 and 12, 14% between 12-

<sup>37</sup> M. Blommenstijn, G. Kruis, R. van Geuns, “Dutch municipalities and the implementation of social assistance: Making social assistance work“, *Local Economy*, n° 27, 2012, 623-625

<sup>38</sup> UWV, “Invloed van verkorting van de maximale WW-duur”, kennismemo 10/09 [http://www.uwv.nl/overuwv/Images/Invloed\\_verkorting\\_maximale\\_WW-duur.pdf](http://www.uwv.nl/overuwv/Images/Invloed_verkorting_maximale_WW-duur.pdf)

18, 15% between 18 and 24, and 30 % between 24 and 38. This decrease of average benefit duration can be seen in the increase of recipients of assistance benefits since the beginning of the century. Therefore, more unemployed, generally younger and women,<sup>39</sup> flow faster into the assistance scheme (if they do not find an acceptable job), with lower benefits as a consequence, as well as an obligation to accept almost any (legal) job, whatever its characteristics. Therefore, the system itself provides for a gradually higher pressure on the unemployed to reintegrate the labour market due to the status change passing into unemployment assistance involves in terms of balance between rights and obligations.

### **3.2. Suitable employment and regulation of the labour market based on the idea of flexicurity**

The period of the 2000s build on the first, limited attempts of re-regulation of atypical contracts initiated in the 1990s, with the idea to limit precarisation induced by part-time, fixed-term and temporary agency work so as to combat segmentation, in line with the implementation of ideas of *flexicurity*.

Protection of standard contracts operates through a system of causal dismissal, with notice periods of one to four months coupled to a system of previous control of the causes and authorization by the UWV (Public Employment Services), without compensation for dismissal, or, at the option of the employer or in case of contestation by the worker of the decision of the UWV, by the Courts, applying a less stricter test of causality but granting compensation if function of a jurisprudential formula (*kantonrechtersformule*).<sup>40</sup> This system of control of the decisions of the employer before it can be executed is quite unique in Europe, and, despite demands from employers' organizations, has never been replaced by the more generally applicable self-executing character of the dismissal with posterior control by Courts or administrative organs.

Part-time work was further addressed by a Part-time Employment Act in 2000<sup>41</sup>, a legislation which was weighed in favor of the employee, as proved by jurisprudence relative to it.<sup>42</sup> Protection is organized in line with the Part-

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<sup>39</sup> UWV, "Invloed van verkorting van de maximale WW-duur", kennismemo 10/09 [http://www.uwv.nl/overuwv/Images/Invloed\\_verkorting\\_maximale\\_WW-duur.pdf](http://www.uwv.nl/overuwv/Images/Invloed_verkorting_maximale_WW-duur.pdf)

<sup>40</sup> A.T.M. Jacobs, *Labour Law in The Netherlands*, Kluwer Law International, The Hague, 2004

<sup>41</sup> Wet Aanpassing Arbeidsduur, of 19/2/2000

<sup>42</sup> M. Blázquez Cuesta, N.E. Ramos Martín, "Part-time employment: a comparative analysis of Spain and the Netherlands", *European Journal of Law and Economics*, n° 28, 223-256, at 226;

time Work Directive,<sup>43</sup> with one important addition, which is that it institutes a subjective right to “switch” back and forth between part-time and full-time, without need to present reasons, only limited in case of proven serious reasons of business interest of the employer.<sup>44</sup> The choice conferred by this legislation has also been effectively enforced by Courts,<sup>45</sup> and it is also important to note that, women and man have generally the same probabilities to increase the numbers of hours they work.<sup>46</sup>

The Flexibility and Security Act of 1999 re-regulated the quite liberalized system of recourse to fixed-term contracts, except for the automatic conversions to an open-ended contract when work continued after its term, prompting employers to wait one month between reengaging.<sup>47</sup> The 3-3-3 rule was created (maximum three contracts, or maximum three years, and minimum three months between fixed-term contract, sanctioned by conversions into open-ended contract) legitimizing quite extended use of fixed-term contracts. On the other hand it consolidated protection for workers with several dispositions: system of fictitious minimum hours for on-call workers, probation period limited to 1 month for contract of less than two years, and finally, a system of presumption of formal (open-ended) contract, in case of a work relation of minimal 20 hours per months during three months. The latter seems not to have been really effective, because the initiative of its enforcement lay in hands of the worker. Collective agreements can alter some of the protection rules, above all the 3-3-3 rule, some enhancing protection, and other reducing it further. However, it is above all the latter which happened, as collective bargaining seems to have progressively altered the 3-3-3 rule towards more flexibility, partly because of decreasing bargaining powers and possibly also as consequence on the concentration of protection for standard workers within negotiations.<sup>48</sup> This

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<sup>43</sup> Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC

<sup>44</sup> S.D. Burri, H.C. Ophitz, A.G. Veldman, “Work-family policies on working-time put into practice. A comparison on the Dutch and German case law on working-time adjustment”, *International Journal of Comparative Labour Law and Industrial Relations*, vol. 19, n° 3, 2003, 321;

<sup>45</sup> J. Visser, “Flexibility and Security in Post-Standard Employment Relations: The Netherlands”, in K. Stone and H. Arthurs, *Rethinking Workplace Regulation. Beyond the Standard Contract of Employment*, Russel Sage Foundation, New York, 2013, 135, 147

<sup>46</sup> M. Blázquez Cuesta, N.E. Ramos Martín, “Part-time employment: a comparative analysis of Spain and the Netherlands”, *European Journal of Law and Economics*, n° 28, 2009, 255

<sup>47</sup> A.B. Keizer, “Non-regular Employment in the Netherlands”, in VV.AA. “Non-regular Employment – Issues and Challenges Common to the Major Developed Countries”, *Japan Institute for Labour Policy and Training Report*, No. 10, 2011, 162

<sup>48</sup> J. Visser, “Flexibility and Security in Post-Standard Employment Relations: The Netherlands”, in K. Stone and H. Arthurs, *Rethinking Workplace Regulation. Beyond the Standard Contract of Employment*, Russel Sage Foundation, New York, 2013, 135, 148

has been an unfortunate move from the point of view of de-commodification, given that “Flexworkers” (fixed-term workers and workers through temporary agencies), in 2011, had around four times more chances to end perceiving unemployment benefits than standard workers.<sup>49</sup>

Agency work was also re-regulated in the same period (while agencies themselves were totally liberalized), imposing non-discrimination rules and information obligations, as well as an important protection feature, which is that a contract with a temporary work agency is deemed to be a formal labour contract, except for the first 26 weeks. This rule has been changed through collective agreements with a system of phases. The rights of the worker grow in function of his advancement in the phases, with an open-ended contract in the last phase, or after a maximum of 3,5 years of temporary work (conditions applicable since 2004, around 7% of agency workers are in the second and third phase).<sup>50</sup>

Above all, an important element, if not the most important, of the “success” of Dutch labour market performance (at least in terms of unemployment) has been the effect of “sharing” the jobs induced by high temporality and part-time work. On the other hand, this high labour market flexibilization has been gradually, even if slightly, reduced over the last decade. This is reflected by the fact that part-time work in the Netherlands seems to be overwhelmingly of a voluntary nature, which is largely a result of collectively negotiated and legal measures designed to make part-time work attractive.<sup>51</sup> Another measure to compensate for flexibility in general has also been the constant indexing of minimum wage to general wage and price developments.<sup>52</sup>

However, less favorable developments are also observed.

It seems that employers in some sectors have restructured their work organization in great part on the most precarious forms of atypical work, a development which finds its expression in the fact that transition rates

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<sup>49</sup> Inspectie Werk en Inkomen. Ministerie van Sociale Zaken en Werkgelegenheid, “Flexibele arbeid en uitstroom”, Report, November 2011, [https://www.inspectieszw.nl/Images/Flexibele%20arbeid%20en%20uitstroom\\_tcm335-327742.pdf](https://www.inspectieszw.nl/Images/Flexibele%20arbeid%20en%20uitstroom_tcm335-327742.pdf), 20. Moreover, agency work gives even worse results than fixed-term work, not only in terms of unemployment, but also in terms of risk of disability.

<sup>50</sup> A.B. Keizer, “Non-regular Employment in the Netherlands”, in VV.AA., “Non-regular Employment – Issues and Challenges Common to the Major Developed Countries”, *Japan Institute for Labour Policy and Training Report*, No. 10, 2011, 166 and 169

<sup>51</sup> J. Visser, “Flexibility and Security in Post-Standard Employment Relations: The Netherlands”, in K. Stone and H. Arthurs, *Rethinking Workplace Regulation. Beyond the Standard Contract of Employment*, Russel Sage Foundation, New York, 2013, 135, 146; W. van Oorschoot, “Balancing work and welfare: activation and flexicurity policies in The Netherlands, 1980-2000”, *International Journal of Social Welfare*, n° 13, 24

<sup>52</sup> J. Visser, “Flexibility and Security in Post-Standard Employment Relations: The Netherlands”, in K. Stone and H. Arthurs, *Rethinking Workplace Regulation. Beyond the Standard Contract of Employment*, Russel Sage Foundation, New York, 2013, 135, 150

between fixed-term and standard employment has decreased from 35% to 18% in less than ten years. Moreover, important wage-gaps between standard employment and fixed-term and agency work shows that from the point of view of the worker, greater flexibility is not compensated by more wage security.<sup>53</sup> On the other hand if compared to other European countries, those wage gaps are amongst the lowest,<sup>54</sup> which would confirm, from the wage point of view, the Netherlands as a model of *flexicurity* given the comparatively milder consequences for workers of labour market segmentation.

Moreover, the *Werk Wet en Zekerheid*, while restricting unemployment protection and the notion of suitable employment also modifies labour law, according to the traditional lines of an intended balanced application of the idea of flexicurity. While flexibilizing protection against dismissal in standard contracts (by limiting cases that can be brought before the judge), it provides for more protection for temporary agency workers, as well as for fixed-term workers, the latter by modifying the 3-3-3 rule so as to limit fixed-term employment to two years, which is to be welcomed, given the tendency of collective bargaining to adapt the 3-3-3 rule in favor of the necessities of employers.

To finish with some lines about the aspects of protection against unemployment related to support measures for the unemployed, the Dutch system of reintegration measures is extremely complex. Next to difficulties of quasi-markets for employment services to living up to the pre-conditions for a well-functioning market (absence of real competition due to a lack of sufficient competitors, necessity of regulation and administrative steering, high transaction costs), they did not involve the development of innovative practices, did not provoked significant cost reductions nor important effects of reintegration, inevitably led to neglecting the needs of unemployed needing complex, and thus costly initiatives, and finally involved less visibility due to complexity and a certain level of confidentiality of business contracts, leading to blurred political accountability.<sup>55</sup> The complexity also resides in the decentralization within the WWB (municipalities are competent for reintegration measures within that scheme) and the contracting out of most reintegration services within a competitive market, with however partial reversals. The diversity of practices, goals and procedures followed by the different actors makes evaluation difficult. The occurrence of creaming (selecting unemployed which are easier to

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<sup>53</sup> J. Visser, "Flexibility and Security in Post-Standard Employment Relations: The Netherlands", in K. Stone and H. Arthurs, *Rethinking Workplace Regulation. Beyond the Standard Contract of Employment*, Russel Sage Foundation, New York, 2013, 135, 152.

<sup>54</sup> European Commission, *Employment and Social Developments in Europe 2011*, 2012

<sup>55</sup> T. Bredgaard, and F. Larsen, "Quasi-markets in Employment Policy: Do They Deliver on Promises?", *Social Policy and Society*, vol. 7, n° 3, 2008, 341-352;

reintegrate) and parking (leaving more problematic unemployed out of the programs) following considerations of cost-effectiveness does not help to solve the picture. Therefore, research seems to be quite negative about the results of the Dutch system of reintegration and concludes to its high costs and the very limited effects the changes of the beginning of the century (contracting out and changes in WWB reintegration) have had.<sup>56</sup>

#### **4. The German model: the creation of a precarised underclass through the combination of assistencialisation and restriction of the notion of suitable employment**

##### **4.1. A Notion of Suitable Employment Defined Under the Principle of Proportionality Limited to Contributory Unemployment Protection**

Germany, in the context of the 2010 Agenda and through the well-known *Hartz*-laws, inspired by the Dutch model through a movement of uploading and downloading of a model of unemployment protection through the Open Method of Coordination in the framework of the European Employment Strategy,<sup>57</sup> reformed its system of unemployment protection mainly based on contributory, wage replacing and status-protecting schemes towards a two-tier system. Unemployed with sufficient contributory periods have access to *Arbeitslosengeld I*, or ALGI, based on contributory wage replacing benefits, whose duration is proportional to previous contributions and limited to one year. After expiration of the contributory scheme or in absence of a sufficient previous contributory period, unemployed have access to the ALG

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<sup>56</sup> J. van Dijk *et alii* “Werk is overal, maar niet voor iedereen. Aan de slag met een doelmatig arbeidsmarktbeleid”, *Report of the Nicis College voor Stedelijke Innovatie*, Den Haag, 2008, which states that integration is extremely expensive (around half a million euro for successful reintegration), while the new system seems only to have bettered overall integration chances of benefit recipients by 3 %; M. Hoogenboom, “The Netherlands: two tiers for all”, in J. Clasen, and D. Clegg, (eds.), *Regulating the Risk of Unemployment: National Adaptations to Post-Industrial Labour Markets in Europe*, OUP, Oxford, 2011, 75-99.

<sup>57</sup> K. Vogler-Ludwig, “Two Years of the Renewed Lisbon Process: Did the European Employment Strategy Gain or not?” *European Employment Observatory Germany Discussion paper*, 2007; S. Stiller and M. van Gerven, “The European Employment Strategy and National Core Executives: Impacts on activation reforms in the Netherlands and Germany”, *Journal of European Social Policy*, vol. 22, n° 2, 2012, 118-132; S. Stiller and M. van Gerven, “The European Employment Strategy and National Core Executives: Impacts on activation reforms in the Netherlands and Germany”, *Journal of European Social Policy*, vol. 22, n° 2, 2012, 118-132.

II system, which merged the previous follow-up systems for unemployed with the general social assistance schemes. The ALG II-system provides means-tested benefits (divided in cash benefits and an allowance for housing and heating costs) guaranteeing the constitutionally sanctioned *Existenzminimum*, or basic income.

Under the contributory system, *Arbeitslosengeld I*, or ALGI, the concept of suitable employment (*Zumutbare Beschäftigung*) is defined under section 140 of the *Sozialgesetzbuch III* (SGB III), and encompasses “all employment corresponding to the abilities” of the worker, in absence of personal or general grounds for refusal.

The law itself defined some of those grounds of refusal (conditions below the law or collective agreement; lower salary, with a threshold starting at 20% of the previous salary and lowering in function of the duration of unemployment, with as ultimate threshold the level of unemployment benefits itself; is also excludes jobs requiring disproportionate travel time). On the other hand, the definition remains open and considers as generally unsuitable those jobs which run against the objectives of unemployment protection as defined by the law or constitutional rights of unemployed<sup>58</sup>, or when, given the personal circumstances (illness, family, care obligations), the acceptance of the job would disproportionately burden the worker.<sup>59</sup>

However, section 140 SGB III states explicitly that the fixed-term character of employment or the fact that it does not coincide with the qualification of the worker does not involve in principle that the job is unreasonable or unsuitable, severing thus the link with the previous occupation, and transforming occupational protection into a mere decreasing salary threshold system.<sup>60</sup>

The current legal notion of suitable employment has been only slightly altered by the Hartz reforms, except for younger unemployed.<sup>61</sup> However,

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<sup>58</sup> For example, the Constitutional Court, in its judgment of 18 November 1986 (1 BvL 29/83), declared the exclusion of students from benefits contrary to the equality principle, given the insurance character of unemployment benefits, and, thus, the fulfillment of the same obligations in terms of contribution of unemployed students.

<sup>59</sup> K. Niesel (ed.), *SGB III Sozialgesetzbuch Arbeitsförderung – Kommentar*, C.H. Beck, München, 2002, 336-340.

<sup>60</sup> S. Sell, „Entwicklung und Reform des Arbeitsförderungsgesetzes als Anpassung des Sozialrechts an flexible Erwerbsformen? Zur Zumutbarkeit von Arbeit und Eigenverantwortung von Arbeitnehmern“, *Mitteilungen aus der Arbeitsmarkt- und Berufsforschung*, vol 31, n° 3, 1998, 539; I. Dingledey, “Germany: moving towards integration whilst maintaining segmentation” in J. Clasen and D. Clegg, (eds.) *Regulating the risk of unemployment*, OUP, Oxford, 2011, 59.

<sup>61</sup> Within this context, it is interesting to observe that the worker will comply with the availability criteria, also when he does not want to accept full-time employment, when part-time employment is considered a usual form of employment in the labour market corresponding to the unemployed. This enlarges the previous adaptation to persons having worked part-time for reasons of care.

the Hartz I law (*„Erste Gesetz für moderne Dienstleistungen am Arbeitsmarkt“*), which applied from the 1<sup>st</sup> of January 2003, reformed and fine-tuned the sanction system.<sup>62</sup>

Refusal of a suitable job offer or to participate in a labour market integration measure is since then sanctioned with a suspension of three weeks the first time, 6 weeks the second and 12 weeks the third. A total of 18 weeks suspensions, without regards to the different reasons involve the loss of right to (contributory) unemployment benefits.<sup>63</sup> Another important change has been the reversal of the burden of proof for the existence of grounds to refuse a job offer or participate in integration measures, which is now to be borne by the unemployed, when those grounds are linked to their sphere of responsibility.<sup>64</sup> The inspiration for this change was found in the jurisprudence, which had assumed that the unemployed carried the burden of proof for grounds linked to personal circumstances, circumstances it is easier for him to prove than the public employment services.<sup>65</sup>

Putting an end to the disproportionate character of the 12 weeks sanction and the absence of alternatives would promote the use of sanctions by the *Bundesagentur für Arbeit*, and the reversal of the burden of proof, even if linked to seemingly practical considerations, would further the evolution towards the individual responsibility of the worker in putting an end to his (insured) situation of unemployment. However, research has shown that not only those legal changes contributed to an increase in the application of sanctions. The *Bundesagentur* accompanied the reform with new directives<sup>66</sup> which also influenced the increase in sanctions. It has also been showed that the latter also depended highly on the resources of the different regional branches of the public employment services, as well as the local level of unemployment (the less unemployment, the more the sanctions).<sup>67</sup>

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<sup>62</sup> Within the contributory system, as established by case-law, the foundation of the sanctions is grounded on the insurance character of the system, and thus on “the need for the community of insured to defend itself against risks for which the insured is himself responsible or in the remedy of which he does not participates”. Therefore a suspension of benefits has to be imposed “when the insured, taking into account all the circumstance of the individual case and striking the balance between his interests and the interests of the community of insured, if another behavior of the insured can be expected”. Davilla, S., *Die Eigenverantwortung im SGB III und SGB II*, Peter Lang, Frankfurt, 2011, 243.

<sup>63</sup> § 159 Sozialgesetzbuch III.

<sup>64</sup> § 159 (1) 2nd paragraph Sozialgesetzbuch III.

<sup>65</sup> K.-U. Müller and F. Oschmiansky, „Die Sanktionspolitik der Arbeitsagenturen nach den „Hartz“-Reformen. Analyse der Wirkungen des „Ersten Gesetzes für moderne Dienstleistungen am Arbeitsmarkt“, *WZB discussion paper*, August 2006, 6.

<sup>66</sup> Rundbrief 55/03 zur Bewerbaktivierung.

<sup>67</sup> K.-U. Müller and F. Oschmiansky, „Die Sanktionspolitik der Arbeitsagenturen nach den „Hartz“-Reformen. Analyse der Wirkungen des „Ersten Gesetzes für moderne Dienstleistungen am Arbeitsmarkt“, *WZB discussion paper*, August 2006.



In 2012, 734.557 sanctions were imposed, with only 7.632 leading to the total loss of benefits. 24,6% were related to the fact that the loss of employment was attributable to the worker (which, as already said, does not lead to the loss of the right of benefits, but only to a sanction), 3,8% for refusal of a suitable job, 1,6% for insufficient efforts in the job search, 1,7 % for the refusal or the interruption of an integration measure (orientation, training,...), 33,3% for failure of showing up at an appointment with the PES, and 35% for late inscription as jobseeker.<sup>68</sup>

Those figures show, like in the Spanish system, that the refusal of a suitable job offer is not to be found as an important feature of conflictiveness in reintegration by unemployed in the labour market. However, it should not be forgotten that the threat of sanctions has in itself a disciplinary effect, for which it is difficult to analyse with precision the influence of the notion of suitable employment on unemployed accepting precarious jobs.

However, an important element in our analysis, and also the most important feature of the Hartz reforms has been the reorganization of the different schemes of unemployment protection in an integrated two-tier system, consisting of the previously commented contributory ALG I, limited to one year, after which unemployed fall into the means-tested ALG II system where unemployed which are able to work perceive social assistance benefits guaranteeing the *Existenzminimum*, or basic income. The latter system is also open to unemployed not qualifying for the the ALG I system because of too short or the absence of contribution periods. Contrary to the ALG I system, where integration contracts are not compulsory, and proposed on an individual basis by the PES, all unemployed under ALG II have to “agree” on an integration contract.

The configuration of *ALG II* as a general scheme for unemployed also involves the obligation to accept a suitable job. However, the content of the notion is different as in the case of *ALG I*, and has a separate definition in the SGB II.

§ 10 of the new SGB II is built on the principle that all jobs are suitable to persons which are able to work, before containing the following exceptions: if the worker is not physically, intellectually or mentally in position to perform the work, if the new job would difficult the finding of a job corresponding to the previous job, but only given the special physical requirements of the previous job, if the job would jeopardize the education of the children of the household, in the absence of available day care facilities, if it would be incompatible with the exercise of care of one or a

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<sup>68</sup> Bundesagentur für Arbeit, *Arbeitsmarkt 2012*, 111, <http://statistik.arbeitsagentur.de/Statischer-Content/Arbeitsmarktberichte/Jahresbericht-Arbeitsmarkt-Deutschland/Generische-Publikationen/Arbeitsmarkt-2012.pdf>

family member which cannot be ensured by other means, or any other special serious ground.

§ 10 (2) SGB II then gives a list of jobs which cannot be considered as unsuitable *in se*, and which will thus require one of the previous conditions for the unemployed to have the right to refuse: employment which does not correspond to qualifications for which the unemployed has been trained or for which she has previously been employed; a job which, taking into account the education/training of the unemployed, has to be considered as inferior; when the workplace is further than the previous workplace or place of training/education; a job with working conditions inferior to the previous work; if it involves the termination of current employment, except if the need for benefits might be ended by the new job.

#### **4.2. Assistencialisation, suppression of suitable employment and precarious employment as reintegration measures**

The limitation of the contributory system to one year and the disappearance of a notion of suitable employment within the context of ALG II brings us to focus the attention on the latter scheme.

The relation between the *ALG II* holder and the administration is strongly asymmetrical and characterized by an important dependency of the former from the latter.<sup>69</sup> Obligations are vaguely described (the law does not define the obligations nor the modalities of the “activation”) and are thus unilaterally defined by the administration. It is also important to note that appeals against decisions are not suspensive. Moreover in case of discretion of the administration, the courts can only annul a decision in case of error, and the decision of the Court has no substitutive effect, in the sense that it only compels the administration to take a new decision<sup>70</sup>.

Also, if no integration contract is signed, it can be replaced by an administrative act (and accompanied with a sanction of decrease of 30% of benefits). Asymmetry manifests itself also in remedies of non-compliance: while non-compliance by the unemployed is (automatically) sanctioned by the administration (consisting in a “retention” of the obligation of the administration, which is payment of benefits) the contrary can only be remedied through court action.

Sanctions have to be applied automatically when there is no justified ground for the behavior of the unemployed contrary to his integration contract or the

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<sup>69</sup> K.J. Bieback, “Kooperation im Zwangsverhältnis. Teilhaberechte und Vertragsstrukturen in der Arbeitsmarktverwaltung“, *Zeitschrift für Rechtssoziologie*, n° 30, 2009, 190.

<sup>70</sup> A. Gagel, *Kommentar SGB III – Arbeitsförderung: mit SGB II: Grundsicherung für Arbeitsuchende*. C.H. Beck, München, 2008, 191.

law,<sup>71</sup> which, above all for unemployed less than 24 years old, for which the only sanction is the scrapping of benefits, is generally seen as disproportionate.<sup>72</sup>

Finally it should also be noted that the *Hartz IV* reform, while increasing activation of social assistance benefit recipients, also meant an extension of coverage of the scheme (activation measures and benefits), not only to persons within the formerly less activating social assistance system, but also to persons formerly considered as incapable to work, persons in training or education, or persons which did not enter into account for the scheme, mostly members of the household of benefit holders. This resulted in an important shift of the social insurance state based on status protection towards a more universalist (better coverage) social protection system, with the integration in a more active system with more visible needy persons, but with lower benefits for those who previously entered in the two wage-related unemployment protection systems.<sup>73</sup>

When looking at the link between suitable employment and precarious work, two elements considered as “integration measures” of ALG II should be taken into account.

The first is the so-called “minijobs”, which would not be accepted as suitable employment under ALG I, because they do not give entitlement to social security benefits, but which in the ALG II system can even be combined to a certain extent with benefits.

This form of marginal part-time work, which had always been present, but sensibly grew within certain parts of the service sector, mainly due to their exemption from income taxes and social insurance contributions to a certain level (450€ per month). Therefore, in 2012, around 1.300.000 persons combined income from work (which however does not give rise to social security rights) and benefits.<sup>74</sup> While those contracts were originally designed for persons, like housewives and students, who did not depend on their work to have access to social security, mainly because of the importance of the breadwinner model, during the 2000s they started to be an important source of precarious employment, to be considered as not only with higher in-work commodifying value, due to the flexibility of their arrangements and the consequent power of the employer over the life

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<sup>71</sup> K.-J., Bieback, “Kooperation im Zwangsverhältnis. Teilhaberechte und Vertragsstrukturen in der Arbeitsmarktverwaltung“, *Zeitschrift für Rechtssoziologie*, n° 30, 2009, 197.

<sup>72</sup> Eicher/Spellbrink-Rixen 2008 § 31 Rz. 53 Kommentar SGB II.

<sup>73</sup> R. Konle-Seidl, “Changes in the governance of employment services in Germany since 2003”, *LAB discussion paper*, n° 10/2008, <https://www.econstor.eu/dspace/bitstream/10419/32752/1/608382280.pdf>

<sup>74</sup> W. Eichhorst, “The unexpected appearance of a New German Model”, *IZA Discussion Paper*, n° 6625, 2012, 17.

organization of the worker, but also with a spill-over effect on entitlement to social security benefits. Generally seen, in 2012, 12,6% of part-time work is involuntary (the worker actually wants to work more hours), which is the same level as 2004, a level which slightly grew with the beginning of the crisis.<sup>75</sup> Concerning the relation between part-time work and unemployment, research has shown that over a period of 5 years, around 20% of part-timers end up in (total) unemployment, a percentage that rose to 29% in the case of marginal employment.<sup>76</sup> Those workers also generally end within the assistance scheme, as they have no access to contributory unemployment protection for lack of social contributions.

Another source of precarisation are the so-called 1-euro-jobs. Those are employment opportunities that provide 1 to 2 euro per hour worked on the basis of 30 hours per week for six to nine months in addition to full benefits, reserved to *ALG II* holders, and have replaced the direct job creation schemes providing for regular jobs at collective agreement level wages qualifying for social security.<sup>77</sup> While they have been found to have positive effects in terms of employability and reintegration chances, above all for women and long-term unemployed, research points towards the substitution effects of those measures for the following reasons. The public interest character of the jobs is in most cases quite relative, or not sufficiently controlled, which led to an important number of unemployed within those jobs (316.000 in August 2010). Moreover, the competitive advantages which they involved for the employers participating in the scheme, did not lead to job creation, quite to the contrary: important substitution effects were observed, for which it can be concluded that those jobs displaced normal employment submitted to social contributions.<sup>78</sup>

In 2011, around 45% of the working-age population had a standard contract, 11% part-time workers, 6% on fixed-term contracts, 2% in agency work, 4% in marginal jobs (mostly minijobs) 7% were self-employed, 1,5% unemployed with a job, 6% unemployed and 21% inactive. 61,7% of the active, employed workforce has thus a standard contract. While in 1992, the proportion of standard contracts was roughly the same (45% of total working-age population, but 66,1% of employed population), it declined over the years but recuperated between 2007 and 2011) and the percentage

<sup>75</sup> OECD, online statistics database, Incidence of Involuntary Part Time Workers, 2014.

<sup>76</sup> K. Schulze Buschoff, P. Protsch, "(A-)typical and (in-) secure? Social protection and "non-standard" forms of employment in Europe, *International Social Security Review*, vol. 61, n° 4, 2008, 57.

<sup>77</sup> B. Ebbinghaus, W. Eichorst, "Distribution of Responsibility for Social Security and Labour Market Policy. Country Report: Germany", *Amsterdam Institute for Advanced Labour Market Studies Working Paper*, n° 97/52, 2007, 46.

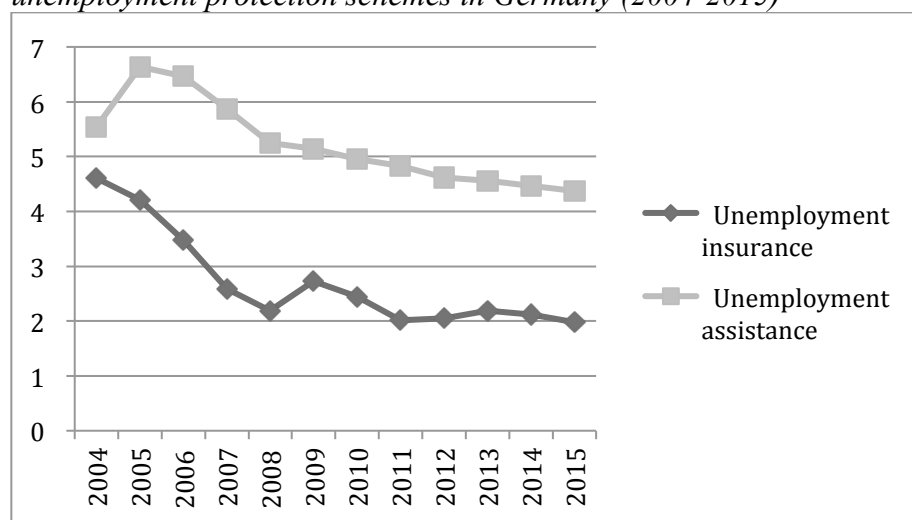
<sup>78</sup> S. Davilla, *Die Eigenverantwortung im SGB III und SGB II*, Peter Lang, Frankfurt, 2011, 198-199.

of inactive population was 26%, the bulk of employment increase in the last 20 years has been in atypical contracts.<sup>79</sup> However, if the labour market is increasingly segmented, the change over the last 30 years has not been radical.

But segmentation of the labour market traduced mainly into wage inequality and growing low pay sector (20% overall, and 30% for women), due amongst other to the wage gap atypical employment involved.<sup>80</sup> This might be one of the reasons why the current debate about re-regulation of the labour market has been centered on the wage component, and mainly the introduction of statutory minimum wage.

Finally, the shortening of the reference period to assess the right to contributory unemployment benefits introduced by the *Hartz* reforms from 3 to 2 years penalizes temporary employment. This is also the reason why a transitory measure has been introduced (and extended to the end of 2014), and will involve that higher numbers of unemployed formerly in temporary contracts will pass directly, or rapidly into ALG II, with higher negative activation and less access to genuine measures reinforcing their employability.

*Evolution of unemployment in contributory and non-contributory unemployment protection schemes in Germany (2004-2015)*



Source: own elaboration from OCED online database 2018 (participant stock on LMP)

<sup>79</sup> W. Eichhorst, V. Tobsch, “Has atypical work become typical in Germany? Country case studies on labour market segmentation”, *SOEPpaper on Multidisciplinary Panel Data Research*, n° 596, 2013

<sup>80</sup> Ibidem.

The liberalization of atypical employment, at the margins of the labour market, combined with an increase of the service sector, the adaptation of market actors to the flexibilisation of some contracts (hostelry and care institution incorporated greatly the minijobs within their employment structure, for example) the relative shrinkage of the scope of collective bargaining and company-level practices have permitted the appearance of a constellation of more, but more unequal employment forms, prejudicating above all low-skilled workers.<sup>81</sup>

Within this context, it is not surprising that ALG II is ever more associated with the phenomenon of “circular mobility”. For example, between September 2011 and August 2012, 1,97 million unemployed under ALG II reintegrated the labour market, but 1,76 million people entered the scheme, half of which had already left ALG II within those same twelve months.<sup>82</sup> This has brought some authors to conclude that through processes of precarisation and stigmatization, the ALG II negative activation system has created a new form of “underclass” moving between precarious employment and precarious social protection.<sup>83</sup>

## **5. Suitable employment and protection in case of unemployment under a multilevel fundamental social rights framework**

### **5.1. Dignity, the right to social security, the right to work and employability**

#### **5.1.1. ILO conventions as expression of the right to social security**

One of the first ILO Convention one thinks about when speaking about unemployment would be the 1952 ILO Convention n° 102 concerning minimum standards on social security. On the one hand, it has been designed with the purpose to promote and guide the incipient construction of the post-war social security systems, by extending coverage and contingencies, promoting adequate benefits, loosening the tie between contributions and benefits and unifying the systems. On the other, it would serve as a framework for new and more specialized Conventions. Both

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<sup>81</sup> W. Eichhorst, V. Tobsch, “Has atypical work become typical in Germany? Country case studies on labour market segmentation”, *SOEPpaper on Multidisciplinary Panel Data Research*, n° 596, 2013; B. Palier, and K. Thelen, “Institutionalizing Dualism: Complementarities and Change in France and Germany”, *Politics & Society*, vol. 38, n° 1.

<sup>82</sup> K. Dörre, „Bewährungsproben für die Untersicht – Soziale Wirkungen aktivierender Arbeitsmarktpolitik“, *forum arbeit*, 3/2013, 7.

<sup>83</sup> Ibidem.

objectives have to be seen within the broader goal of preventing competition on basis of labour costs<sup>84</sup>.

Part IV of Convention 102 concerns unemployment, and has been ratified by a great number of EU Countries<sup>85</sup>. It defines the unemployment contingency as “suspensions of earnings, as defined by national laws or regulations, due to inability to obtain suitable employment in the case of a person protected who is capable of, and available for, work”.

An important element of the protection is the idea of absence of suitable work. To help interpreting this concept, recourse has to be made to ILO Convention 44, which defines more concretely the notion, also in the context of allowing suspension of benefits for an adequate period in case of refusal of a suitable employment, and also ILO Recommendation 67 on Income Security.

In this context, work shall be considered as not suitable when its acceptance involves new residence without adequate accommodation, lower wages or work conditions, or at least lower than those fixed by collective agreements were applicable. Also, an occupation which is a priori suitable can be refused, if the refusal is not unreasonable, giving all considerations involved, including the personal circumstance of the unemployed. Have to be taken into account the length in the previous occupation, the chances of obtaining work in the same occupation, vocational training and suitability for work of the unemployed. Finally, after a period considered reasonable, giving the circumstance of the case, the suitability can be interpreted more broadly, and can, under certain conditions, involve change of residence or less favourable working conditions<sup>86</sup>.

It is important to observe that during the drafting of the Convention, the ILO Office made clear (already in 1951) that the main requirement of an effective unemployment system are efficient employment services, facilities for retraining and a general programme of full employment, three elements without which unemployment cannot be controlled and its duration shortened.<sup>87</sup> This should be seen as a link between the notion of suitable work and the availability of support for the unemployed for a meaningful or durable reintegration in the labour market. The absence or insufficient character of the support the unemployed receives in his reintegration trajectory should thus be taken into account when assessing her obligation to

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<sup>84</sup> T. Dijkhof, *International Social Security Standards in the European Union. The Cases of the Czech republic and Estonia*, Intersentia, 2011, 4.

<sup>85</sup> Austria, Denmark, France, Germany, Greece, Ireland, Luxemburg, The Netherlands, Portugal, Slovenia, Spain, Sweden and the UK.

<sup>86</sup> T. Dijkhof, *International Social Security Standards in the European Union. The Cases of the Czech republic and Estonia*, Intersentia, 2011, 65-66.

<sup>87</sup> T. Dijkhof, *International Social Security Standards in the European Union. The Cases of the Czech republic and Estonia*, Intersentia, 2011, 69.

accept jobs which would represent an occupational degradation. On a broader level, it links the obligation of the unemployed with the obligation of the State in terms of support measures, for a conceptualisation of the latter as a right of the unemployed.

In this respect, it is also important to mention Convention 168, which, however still not having been ratified by a lot of countries, ties full employment policies more tightly to unemployment protection. On the one hand it obliges the signatories to consider a priority a policy designed to promote, full, productive, and freely chosen employment by all appropriate means, and cite explicitly amongst those means employment services, vocational training, and vocational guidance above all amongst categories of persons liable to have difficulties in finding lasting employment (art. 7 and 8).

The Convention uses a lot of the same categories and concepts as Convention 102, but fixes higher standards (85% of employees to be covered, 50% of previous salary or, in case of non-salary related benefits, the highest amongst three minimum thresholds: 50% of minimum wage, 50% of the wage of an ordinary labourer, or the minimum essential for basic living expenses, minimum period of 26 weeks per spell of unemployment or 39 weeks over a period of 24 months). It includes also temporary unemployment in case of suspension of contracts within the contingencies. Benefits can be refused, suspended, reduced or ended in case of voluntary unemployment, refusal of suitable employment or, which is new, “when the person concerned has failed without just cause to use the facilities available for placement, vocational guidance, training, retraining or redeployment in suitable work”.

According to the Committee of Experts of the ILO, the social goal the notion of suitable employment as an ILO standard fulfils is to preserve workers “against compulsion to accept work below their level of education and skills”. Within that perspective, it could be said to have no direct connection with the precarious character of the jobs to be accepted, as long as those jobs correspond to the skills of the workers. On the other hand, the Committee of Experts states clearly that “unemployment benefits should not be used as an instrument for channelling unemployed persons into any available jobs under the threat of having no income at all, which would completely undermine the nature and purpose of unemployment benefit as considered by ILO standards. The Committee considers that treating all workers as ordinary labourers who should only be physically and mentally fit for the job they are offered, leads to commodification of the labour market and negation



of the principle that “labour is not a commodity” enshrined in the Declaration of Philadelphia”<sup>88</sup>

It should also not be forgotten that the broadening, and after a period of time, disappearance of the notion of suitable employment in function of the duration of unemployment has to be seen in parallel with the negative activation function of the limited duration or the degradation in benefits, constituting thus a double degradation (and thus affection of the dignity) which the unemployed has to suffer. Therefore, the notion of suitable employment has to be interpreted within the context of proportionality. Within that framework, the widening of the notion of suitability in function of time constitutes a restriction of the fundamental right to dignity. Therefore, the “degradation”, compared to the qualifications, previous employment and expressed choices of the unemployed should answer a legitimate goal, no other measures should be available (like retraining or the existence of other jobseekers for whom the job would not signify such a degradation) and a proper balance has to be struck between the interests of the unemployed and those of the state, or community of insured.

Within this context, the automatic disappearance of the limits to the employment which an unemployed has to accept within the Dutch and German means-tested systems, should not be considered as acceptable. In those models, there is an ever greater proportion of workers under atypical contracts who end more rapidly within means-tested schemes which involve the obligation to accept any (legal) job. Those workers do not have the same rights in terms of refusing unsuitable employment as workers with the right to longer periods under the systems of contributory unemployment benefits. Degradation operates thus more rapidly, but not in function of the time in which those workers have been unemployed, but merely under their falling within a different protection scheme. Those cases should thus be considered to be unacceptable, above all when taking into account the cases of “circular mobility” observed in those cases.

One could object to such a vision by stating that, under the international social rights instruments analyzed, the application of the notion of suitable employment as a limit to the obligatory reintegration of unemployed within the labour market is limited to the scope of the obligation of the Contracting Parties to provide unemployment protection schemes (being mainly limited contributory schemes with minimal coverage), and this scope does not extend to the follow-up means-tested schemes of social assistance or ALG II.

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<sup>88</sup> Committee of Experts of the ILO, “General survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization”, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1B), 100<sup>th</sup> session of the ILO, 2011, 210.

However, a justified answer to that objection could be rooted in the human right to social security. Its conceptualization as a fundamental human right, for example through the interpretation of the UN Committee of Social, Economic and Cultural rights, involves the existence of some core elements as the minimal content of the obligation of the state:<sup>89</sup>

- Adequate benefits ensuring the right to family protection, an adequate (or dignified) standard of living and the right to health
- Coverage of all risks and contingencies associated with the inability to realise social, economic and cultural rights (to which one could add the realization of individual fundamental rights)
- Affordable contributions in case of social insurance
- Non-discrimination in the guaranteeing of social rights

As such, the right to social security is to be defined in terms of an obligation of the state to provide protection against social risks. It is the existence of a risk in which the right is rooted, which means that it is the occurrence of a risk which actions the right to protection. This implies an important connection between the reality faced by individuals and the legal framework which has to take into account that reality.

It also involves that the definition of the scope of social security does not depend on the characteristics of the programs and policies, but the risks which those programs cover. It is one of the reasons for which, for example, the private character of some insurance programs does not automatically exclude them from the scope of social security,<sup>90</sup> or that qualifying unemployment protection schemes as insurance based, tax-based, with means-tested benefits or wage-replacement benefits does not exclude them from the scope of the right, or the obligation to provide social security.<sup>91</sup>

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<sup>89</sup> W. Langford, "Social Security and Implications for Law, Policy and Practice", in Riedel, E., (ed.) *Social Security as a Human Right: Drafting a General comment on Article 9 ICESCR. Some challenges*, Springer, Berlin, 2007, 29-53.

<sup>90</sup> D. Pieters, *Social Security: An Introduction to the Basic Principles*, Kluwer Law International, Alphen aan de Rijn, 2006, 3-4; U. Becker, "Privatization and Activation: Analysis", in U. Becker and F. Pennings, (eds.) *International Standard-Setting and Innovations in Social Security*, Kluwer Law International, Alphen aan de Rijn, 2013, 386.

<sup>91</sup> This is for example also the stance of ILO Conventions on unemployment protection, like Convention 102, which provides for both systems, contributory or tax-based, as systems of protection against unemployment. Also, entitlement to social protection benefits is considered by the ECtHR as a right protected (as "possession") independently of the involvement of the claimant in the (economic) constitution of the right. The right to social security under the ECHR (even if limited as a right to possession of benefits) shares also an integrated view of social security, centred on the risk to be protected, however limited to the right of access to existing systems.

In that line, the European Committee of Social Rights seems to take into account the German system of *ALG II* (assistance benefits) as part of social security for unemployed.<sup>92</sup>

Within such a framework, the disappearance of the notion of suitable employment as a limit to precarious reintegration of unemployed in the labour market applying solely for the reason that those unemployed are not able to access a more protective system, in some cases even because the activation measures under the means-tested system forced them to take up employment not permitting them to qualify for the more protective system (“circular mobility” phenomenon or precariousness trap), should not be justified under the fundamental right to social security.

This seems also to be the vision of the Committee of Experts of the ILO, which considers that a policy disregarding the notion of suitable employment for long-term unemployed, obliged to accept any job offered, would not be compatible with Convention 168, “since this instrument does not permit any trade-off between the suitability of employment and the duration of the benefit, where provision of longer benefit may be conditioned by the acceptance of less suitable jobs”. The distinction operated by Convention 168 between short-term and long-term unemployment involves not the possibilities for states to introduce stricter benefit conditions, but the obligation to provide unemployed with additional assistance in finding suitable employment.<sup>93</sup>

It should also be said that the obligation of unemployed falling into the means-tested schemes to accept any jobs, could also be analysed under the framework of unequal treatment. Within this perspective, could it be considered as justified that some unemployed, for the only reason of falling under that scheme, are deprived from any protection as to the form of their reintegration in the labour market?

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<sup>92</sup> European Committee of Social Rights, Conclusions XX-2 (2013) (Germany), 18, [http://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/State/GermanyXX2\\_en.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/State/GermanyXX2_en.pdf)

<sup>93</sup> Committee of Experts of the ILO, “General survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization”, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1B), 100<sup>th</sup> session of the ILO, 2011, 209.

### 5.1.2. The approach of the European Social Charter: the right to work

#### *The right to work as an individual right*

When constructing the notion of suitable employment under a fundamental social right perspective, attention should also be given to the European Social Charter. Article 12 of the Charter contains the obligation of the Parties to maintain a system of social security at least at the level of ILO Convention 102 and to progressively raise its level. This links the Charter clearly with the ILO framework on Social Security.

Concerning suitable work as a sanctionable obligation of unemployed, the European Committee of Social Rights has also generally accepted the evolution towards negative activation measures (sanctions), considering however that the conditions to which the payment of unemployment benefits is subjected, including any obligations to take up offered employment, should be assessed under Article 12-1 of the Charter (or Article 12-3 in the case of new developments) or, in certain cases, in case of loss of unemployment benefits due to refusal of employment, under article 1-2, considering the possible violation of freedom the right to freedom of work. A Statement of Interpretation concerning this subject has been reiterated in the General Introduction to the 2012 Conclusions.<sup>94</sup> More generally, the

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<sup>94</sup> Article 1-2: requirement to accept the offer of a job or training or otherwise lose unemployment benefit

The requirement for persons claiming unemployment benefit to accept the offer of a job or training or otherwise no longer be entitled to unemployment benefit should be dealt with under Article 12-1. However, the Committee takes due account of the Guide to the concept of suitable employment in the context of unemployment benefit drawn up by the Committee of Experts on Social Security of the Council of Europe at its 4th meeting, held in Strasbourg from 24 to 26 March 2009, and holds that the loss of benefit or assistance when an unemployed person rejects a job offer may constitute a restriction on freedom to work where the person concerned is compelled, on pain of losing benefit, to accept any job, notably a job:

- which only requires qualifications or skills far below those of the individual concerned;
- which pays well below the individual's previous salary;
- which requires a particular level of physical or mental health or ability, which the person does not possess at the relevant time;
- which is not compatible with occupational health and safety legislation or, where these exist, with local agreements or collective employment agreements covering the sector or occupation concerned and therefore may affect the physical and mental integrity of the worker concerned;
- for which the pay offered is lower than the national or regional minimum wage or, where one exists, the norm or wage scale agreed on for the sector or occupation concerned, or where it is lower, to an unreasonable extent, than all of the unemployment benefits paid to the person concerned at the relevant time and therefore fails to ensure a decent standard of living for the worker and his/her family;
- which is proposed as the result of a current labour dispute;

Committee has also analysed negative activation measures under articles 12 and 13 of the Charter taking into account the following elements: the measure has to be reasonable and consistent with the objective of providing a long-lasting solution to the problem of deprivation experienced by the individual (this was developed in the framework of article 13 – social assistance, but could be applied within the broader framework of unemployment protection, insisting on the long-lasting character of the return to work), account has to be taken of the number of persons adversely affected by the measures, the existence of reasons to refuse work, the extent of the reductions of benefits, the purpose of the conditionality, and the means which are given to the services to monitor case-studies.<sup>95</sup>

The approach of the Committee shows the important connection of the idea of suitable employment with the right to work.

The right to work is one of the economic and social rights which present the most difficulties not only as to its content but also as to its realization.

Firstly, it has a vague character which gives rise to diversity of meanings and interpretations. Not only from a theoretical point of view, which make it sometimes viewed as having an inferior status among the already (erroneously) criticized vague character of social rights. In this sense, it poses the difficult questions of its situation between the right to being idle and exploitation within the labour market, inclusion or exclusion of non-paid form of works or care, generally heavily gender-related, or its implication for and its interchangeability with the right to a basic income.<sup>96</sup>

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•which is located at a distance from the home of the person concerned which can be deemed unreasonable in view of the necessary travelling time, the transport facilities available, the total time spent away from home, the customary working arrangements in the person's chosen occupation or the person's family obligations (and in the latter case, provided that these obligations did not pose any problem in the person's previous employment);

•which requires persons with family responsibilities to change their place of residence, unless it can be proved that these responsibilities can be properly assumed in the new place of residence, that suitable housing is available and that, if the situation of the person so requires, a contribution to the costs of removal is available, either from the employment services or from the new employer, so respecting the worker's right to family life and housing.

In all cases in which the relevant authorities decide on the permanent withdrawal or temporary suspension of unemployment benefit because the recipient has rejected a job offer, this decision must be open to review by the courts in accordance with the rules and procedures established under the legislation of the State which took the decision.

<sup>95</sup> J. Tooze, "Social Security and Social Assistance", in J. Kenner and T. Hervey, (eds.), *Economic and Social Rights under the EU Charter of Fundamental Rights*, Hart Publishing, Oxford, 2003, 190.

<sup>96</sup> G. Mundlak, "The Right to Work – The Value of Work" in D. Barak-Erez and A. Gross (eds), *Exploring social rights: Between theory and practice*, Hart Publishing, Oxford, 2007, 342.

The right to work is often implying an obligation for the states to implement policies aimed at attaining full employment. According to the Committee of Social Rights, “if a state at any time abandoned the objective of full employment in favour of an economic system providing for a permanent pool of unemployed, it would be infringing the social charter”<sup>97</sup>. Seen in this light, one could sustain that the obligation to aim at full employment seems to have been forsaken by many a country, even if not overtly, by abandoning any link between protection against unemployment and demand-side policies, and focusing mainly on activation and other supply-side policies to “create” employment. This stance should be seen as implicitly accepting the neoliberal and human-debasing theories about the “natural rate of unemployment” or the necessity to maintain a “reserve army” as numerous as possible for markets to function optimally, without regards for moral implication or consequences on society.

Moreover, the European Committee of Social Rights has furthered itself from the idea of full employment, by deciding in 1984 not to review the compliance of states with the goal of full employment, but only the measures taken to achieve that goal.

From the perspective of legal instruments, those practical difficulties are enhanced by the different positions and content of the right in the constitutional and international rights instruments incorporating it. The right to work within the EU charter, let alone within the general EU legal framework, with its highly marked individual and commodified character, does not correspond at all with the right to work as framed within the International Covenant on Social, Economic Rights, or the European Social Charter.

The European Social Charter for example encompasses a broad spectrum of rights and obligations within the concept of the right to work, from the obligation or rather responsibility of the state to provide work to the right to non-discrimination in the access to work, the prohibition of forced labour, the freedom to choose one’s occupation and the right to vocational training and job placement (articles 1, 9, 10 and 15 of the ESC).

On the other hand, article 15 of the CFUE seems to define the right to work mainly in terms of the freedom to pursue one’s business or engage into work, moreover within the context of the right to free movement, as confirmed by the jurisprudence referred to in the Explanations.<sup>98</sup> The latter do not connect article 15 CFRUE with article 1-1 ESC, but rather with article 1-2, apparently excluding interpretation of the CFRUE’s right to work in terms of obligation for the states to ensure employment for all. This

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<sup>97</sup> European Committee of Social rights, *Conclusions I*, 1969-70, 14.

<sup>98</sup> D. Ashiagbor, “The Right to Work”, in G. De Búrca and B. de Witte (eds.), *Social Rights in Europe*, Oxford, 2005, 243-244.

inscribes itself within a legal framework which, even in terms of creation of employment, put the market as the main, and almost sole responsible for the fulfilment of the main possibility to effectively exercises that freedom.<sup>99</sup>

Another problematic aspect of this right is that it could even be said to be “dangerous”. At a theoretical level, it has been criticized for inducing people into exploitation through the employment relation, amongst other “techniques” through interpreting it as implying a duty to work in disguise,<sup>100</sup> certainly when coupled with the activation aspects of new welfare state models. Combined with the interpretation of the right to work as paid work, or commodified work, this has also effects on the capacity to care and its gender-related consequences.

There is here, however, a problem of logical interpretation of the content of fundamental rights. Fundamental rights should not imply enforceable correlated duties to the owner of the right, other than within the context of the balance with other fundamental rights in case of conflict. Or it could be said that duties associated with some fundamental rights, find their origin more in the idea of solidarity than the core content of the right itself.

But even if the duty to work could be connected to the idea of solidarity, this would be in a negative way, in the sense that there is a duty not to depend on solidarity when one does not have to, lowering as such the possibilities or extent of access to solidarity to those who really need it. But this leaves the question open to who needs solidarity and who does not. And as solidarity is not in itself a right or a fundamental right, but more a value, a social norm, or a broader category of rights (see for example the “solidarity rights” of the EUCFR), from a legal perspective this question has to be resolved taking fundamental rights into account, amongst which the right to work, which cannot be done when that right is also read as a duty.

As shown in the German context, the right to work contained in article 12 of the Basic Law, framed as the right to freely choose an occupation which one can value and which can secure one’s means of existence, not only can be framed as legitimating protection against unemployment as a means to guarantee that right, but can also theoretically serve as a limit to work-first measures, or the degradation of the notion of suitable employment. Dutch jurisprudence has also indirectly interpreted article 4 of the ECHR (prohibition of slavery and forced labour) along the same lines in the case of obligatory participation in work-first projects, so as to strike down the imposition of work-first measures which were not proved to contribute to the meaningful reintegration of the concerned unemployed.

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<sup>99</sup> A. Lasa López, *Constitución económica y derecho al trabajo en la Unión Europea*, Comares, Granada, 2011, 217-221

<sup>100</sup> G. Mundlak, “The Right to Work – The Value of Work” in D. Barak-Erez and A. Gross, (eds), *Exploring social rights: Between theory and practice*, Hart Publishing, Oxford, 2007, 342.

Therefore, the freedom of choice of occupation (enshrined in article 6 of the International Covenant on Economic, Social and Cultural Rights, but also article 1-2 of the European Social Charter, or article 15.1 of the Charter of Fundamental Rights of the European Union) should function as a limit to the degradation of suitability. It would imply that someone would not be free if he or she had to enter into an occupation he or she reasonably does not want, under the pressure of need. Moreover, the principle of dignity would also constitute a limit to that degradation, in the sense that a job which would prevent or seriously impede the personal development of someone, taking into account his qualifications and capabilities, should not be considered as suitable.<sup>101</sup> The principle of dignity should thus also constitute a limit to the degradation involved by the enlargement of the criteria of suitability of a job in function of the duration of unemployment, taking into account the conditions of the labour market. A job which would prevent or seriously impede the personal development of someone, given his qualifications and capabilities, should never be considered as suitable.

### ***The right to work as an obligation of the state***

To come back to the obligation of states, under international social security standards, to provide assistance to unemployed to take up suitable employment, reference should again be made to the right to work, under its programmatic aspect. Within the context of the European Social Charter, despite the abandonment of a direct assessment of full employment policies under the right to work, the European Committee of Social Rights still gives some meaningful positive content to that right, which is important within the context of activation.<sup>102</sup> In 1999, the monitoring procedure of the European Social Charter in respect of article 1-1 was “restarted”, based on an assessment of the balance between several indicators like economic performance, employment rate, unemployment, labour policy, also with

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<sup>101</sup> F.J. Smit, “Suitable Employment as a Human Right“, in P. De Waart, E. Denters, N. Schrijver, *Reflections on International Law from the Low Countries: In Honour of Paul De Waart*, Martinus Nijhoff Publishers, 1998, 195-196; It is also important to point out that the Committee of Economic Social and Cultural Rights, in its General Comment n° 18 on article 6 of the ICESCR (right to work), of 24/11/2005, states that the freedom of the individual regarding the choice of work is linked to the respect of the dignity of the individual; see C. O’Cinneide, “The Right to Work in International Human Rights Law”, in V. Mantouvalou, (ed.), *The Right to Work. Legal and Philosophical Perspectives*. Hart, 2015, 105

<sup>102</sup> M.Freedland and N. Countouris, “The Right to (Decent) Work in a European Comparative Perspective” in V. Mantouvalou, *The Right to Work: Legal and Philosophical Perspectives*, Hart, 2015, 129-132, also argue that ALMPs within the context of the European employment Strategy are to be seen as “right to work interventions”, even if their reality makes them resemble more to “duty to work interventions”.



attention to measures destined to the categories most affected by unemployment, as well as long-term unemployment<sup>103</sup>. Concerning labour market policy, the Committee seems to have narrowed its approach to only taking ALMPs into account, as most cases of non-compliance (in the 2012 “round”) are now related to insufficient or ineffective ALMPs.<sup>104</sup> On the one hand the Committee assesses the employment situation, generally in terms of unemployment and employment rates compared with economic growth. On the other hand, it assesses broadly the adequacy of employment policy, generally interpreted in terms of measures of active labour market policies compared to rate of unemployment and economic growth, with sometimes special attention to long-term unemployed as well as youth.

An interesting feature of the interpretation by the Committee is that for EU countries, the rate of access of unemployed to ALMPs as well as spending on ALMPs are compared with the EU average, taking EURESOTAT as a source, and the country is found to be in non-compliance when it is below that average.<sup>105</sup> This should also be read taking into account General Comment 18 of the UN Committee on Economic, Social and Cultural Rights, which considers as a violation of the right to work of article 6 of the Covenant on Economic, Social and Cultural Rights, amongst others, “the failure to adopt or implement a national employment policy designed to ensure the right to work for everyone; insufficient expenditure or misallocation of public funds which results in the non-enjoyment of the right to work by individuals or groups”.<sup>106</sup>

It centres also on sufficient training for long-term unemployed, or access of unemployed to ALMPs in a context of rise of unemployment despite economic growth.<sup>107</sup> There is thus a clear connection between the right to work and the right to vocational training. It is also important to note that, for Spain, the Committee reserved its 2012 conclusions, observing that more than 55% of unemployed had access to ALMPs, but wanted more information of the type of ALMPs unemployed had access to. Well now, a brief look at the online EUROSTAT database could have shown the Committee that almost 70% of unemployed having access to ALMPs in reality have access to what EURESOTAT calls “employment incentives” i.e., as our Spanish case study has shown, mainly decreased social security contributions in favour of the employer without sufficient conditions related to employment creation. Only 13% had access to training in 2010, and less than 3,4% had access to “labour market services” i.e. orientation and

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<sup>103</sup> M. Mikkola, *Social Human Rights of Europe*, Karelactio, Porvoo, 2010, 138-146.

<sup>104</sup> *Conclusions 2012 – Slovak Republic, Turkey, Bulgaria Georgia*.

<sup>105</sup> *Conclusions 2012 – Italy – Article 1-1*.

<sup>106</sup> Committee on Economic, Social and Cultural Rights, General Comment N° 18 The Right to Work, 24 November 2005, E/C12/GC/18, point 36.

<sup>107</sup> European Committee of Social Rights, *Conclusions 2012 - Slovak Republic - Article 1-1*.

placement. Within this respect, it could be concluded that, at least in 2010, Spain violated the right to work of article 1-1 of the ESC, as interpreted by the Committee of Social Rights.

This approach connects again with the view of the ILO Committee of Experts on the purpose of unemployment protection under ILO Standards, exposed here above, under which the idea of suitable employment involves the obligation of the states to provide additional assistance to long-term unemployed to find acceptable employment. From this point of view, there is a clear link between suitable employment as a limit to the obligation of unemployed to reintegrate the labour market, the right to work as a limit to the degradation of the notion of suitable employment and the right to social security.

Those connections also configure the notion of suitable employment, not only as a limit to the individual obligation of unemployed to reintegrate the labour market, but also as an element of the definition of the obligation of the states under the right to work, under its programmatic aspect, as to the goal of their employment policies.

Again, according to the ILO Committee of Experts, the states have the obligation “eliminate the risk of undue suspension of benefits in case of refusal to accept unsuitable jobs by restoring balance between quality of jobs offered and qualifications of jobseekers”. Within this perspective, the obligation to accept any (legal) employment has to be construed taking into account the obligations of states to provide the unemployed with the proper services to make them able to take up suitable employment, and not “orienting the employment services to providing workers suitable for jobs rather than jobs suitable for workers”.

As just seen, the right to work approach has thus some importance as an argument for recalibration of ALMP towards more enabling measures like training, on the one hand, and guaranteeing genuine access to those measures.

However, concerning active labour market policies, the flagship initiative “An Agenda for new skills and jobs: A European contribution towards full employment”, which encompasses the European Employment Strategy within the Europe 2020 framework<sup>108</sup>, does not provide for real guidelines concerning the support of unemployed to find suitable employment. Even worse, the Commission insists on the fact that further attention should be given to the cost-effectiveness of ALMPs and the conditionality of benefits with participation, two elements which have been proven at the centre of an on the one hand, the sharpening of the notion of suitable employment as a limit to the obligation of reintegration and the prioritization of the support of

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<sup>108</sup> European Commission Communication 2010/0682 final: An Agenda for new skills and jobs: A European contribution towards full employment.

workers with greater chances of reintegration, to the detriment of other unemployed, augmenting their chances to have to accept any “legal” job. While being an important part of *flexicurity* policies, the document does not really highlight the importance of training of unemployed, only naming it between other activation measures PES should comprehensively provide in a more targeted way to more vulnerable workers (low-skilled, younger workers, older workers, unemployed). Mention is made of the necessity of re-skilling of older workers, blue-collar workers and workers returning from parental leave, but training seems not to be viewed as a right, nor given special place within ALMPs, and not even mentioned within the section related to those measures, which seems to be only seen in connection with the necessities of the labour market, rather than increasing the life choices of the unemployed. The document further treats training within *flexicurity* policies as continuous training of the labour force in general, or within the framework of short-term working arrangements like the German system of *Kurzarbeit* (involving working time reduction coupled with partial unemployment benefits).

These findings echo the more general conclusion made by Freedland and Kountouris about the fact that the European Employment Strategy has “somewhat ground to a halt” as a “right to work” intervention.<sup>109</sup>

But the previous observations about the notion of suitable employment under an international social fundamental rights perspective centred on the right to work should also bring us to put forward another perspective on the more concrete definition of the right to work as programmatic obligation of the states, inspired from the more general idea of interconnectedness of fundamental or human rights. What is meant here, is that other obligations of states under social fundamental rights which are not directly connected to the right to work could be brought forward as “right to work interventions” as defined by Freedland and Kountouris.

As an example, one could refer to article 4 of the 1988 Additional Protocol to the European Social Charter (Right of the elderly to social protection). The European Committee on Social Rights analysed the Spanish “Ley de Dependencia” which involved financing of care services for dependent persons, mainly elderly, as a realization of that right. Studies of the effect of that Law found that it had an important effect on creation of employment in the social services sector, at a time when unemployment in Spain rose from 10 to 27%, next to be an attempt to formalize, from the point of view of social security contributions, care by members of the family.<sup>110</sup> From that

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<sup>109</sup> M. Freedland and N. Kountouris, “The Right to (Decent) Work in a European Comparative Perspective”, in V. Mantouvalou, *The Right to Work. Legal and Philosophical Perspective*, Hart, 2015, 131.

<sup>110</sup> A. Rodríguez Castedo, and A. Jimenez Lara, “La atención a la dependencia y el empleo”, Documento de trabajo 159/2010, Fundación alternativas, 2010.

point of view, the realization of the right to social protection could also be read under the right to work, as it created non-precarious employment, moreover in highly feminized sector, indirectly contributing to the availability of suitable employment. It should however be noted that fiscal consolidation in the wake of the crisis ultimately led to infrafinancing of the scheme.

Finally, another important aspect for the connection between suitable employment and precarious work is the framing of the right to work in the Spanish Constitutional context, as a right to protection against termination of employment. According to the Spanish Constitutional Court, the individual perspective of the right to work of article 35 of the Constitution involves a right to stability in employment, which has to be guaranteed by a right not to be dismissed without a legally established cause, implying also formal guarantees as to the visibility of the dismissal, as well as the right to an “adequate reaction” against the dismissal, which established the possibility of revision by the Courts of the cause and procedure under the right to fair and effective trial of article 24 of the Constitution.<sup>111</sup>

The German Constitutional Court also recognized from a reading of the right to freedom of occupation within the light of the Social State clause, and the right to stability in employment derived thereof, the constitutional obligation of the state to establish a minimum level of protection against dismissals as well as guarantee its (minimal) revision by the Courts.<sup>112</sup> However, the Court has not gone as far as stating that dismissal has to be grounded in a cause, but that the employer has to respect at least a minimum a level of social protection by taking into account to a certain extent the social interests of the worker within the framework of the contractual obligation to good faith.<sup>113</sup> Protection against dismissal is framed within the context of balancing the right to freedom of enterprise and the right to freedom of occupation.

It is however, quite strange that this right to stability in employment has not received much constitutional attention from the perspective of temporary contracts. If the former involves some protection as to the termination of the contract, it would be logic to think that some protection would be implied, of course not at the termination, given the particular nature of temporary employment, but at the moment where that termination is decided, i.e., at the start. A correct understanding of the right to stability in employment under this framework would be that temporary contracts should also be grounded in a (legal, real and reviewable) cause, and not only left to contractual

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<sup>111</sup> A. Baylos and J. Pérez Rey, *El despido o la violencia del poder privado*, Trotta, Madrid, 2009, 51-52.

<sup>112</sup> A. Seifert and E. Funken-Hötzl, “Wrongful Dismissals in the Federal Republic of Germany”, *Comparative Labor Law & Policy Journal*, vol. 25, n° 4, 2005, 495.

<sup>113</sup> Ibidem.

autonomy.<sup>114</sup> The lack of constitutional attention to the question might have been one of the reasons for a wide interpretation of the causes within the Spanish system and important problems of enforcement, leading to a *de facto* liberalization of temporary contracts and the highest rate of temporality in the European Union.<sup>115</sup> In Germany for example, there is no causality required for temporary contracts of less than two years.

Also, it is important to observe that the right to adequate protection against unjustified dismissal is also recognized as a stand-alone right in article 30 of the EU Charter of Fundamental Rights, as well as in article 24 of the Revised European Charter.

Under this perspective, the notion of suitable employment could be construed under the the right to stability in employment, reinforcing the idea that the notion of suitable employment could not be construed as obliging unemployed to take up precarious forms of work, or those types of work which would not guarantee durable integration within the labour market.

## **5.2. Suitable employment as a factor of de-commodification of activation policies**

Suitable employment as a component of the obligation of unemployed to reintegrate the labour market could be reconstructed under a fundamental social right framework as: decent employment giving access to social security; which should correspond to qualifications, skills and aspiration of the unemployed; even if those aspirations could be considered to have to be gradually reduced according to the length of the period of unemployment; the latter depending however on the fulfilment by the state of its obligation to provide suitable jobs and support the unemployed in their adaptation to the labour market and their research of suitable employment; without that this notion could be reduced to a mere notion of “legal” employment.

However, the usefulness of this reconstruction of the notion of suitable employment to limit the reintegration of workers in the labour market through precarious jobs remains to be assessed under the spectrum of possible legal policies. From this point of view, it is argued that on the one hand, it sheds an additional light on current aspects or the orientation of systems of protection against unemployment, stressing in some cases their flawed character, not only from the point of view of the realization of fundamental social rights, but also concerning their lack of logic within the

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<sup>114</sup> A. Baylos and J. Pérez Rey, *El despido o la violencia del poder privado*, Trotta, Madrid, 2009, 52.

<sup>115</sup> J. López, A. de le Court, S. Canalda, “Breaking the equilibrium between flexibility and security: flexiprecarity as the Spanish version of the model”, *European Labour Law Journal*, 2014, vol. 5, nº 1, 2014.

goals they are assigned by policy frameworks like the European Employment Strategy. On the other hand, it is argued that the concept of suitable employment under a fundamental social rights framework could form the basis of legal arguments to challenge some aspects of its actual design or application at a national level.

The global insufficiency characterizing the Spanish model of unemployment protection, above all in terms of coverage, structure of ALMPs and Public Employment Services deprives the concept of suitable employment of any significant meaning in guaranteeing that jobseekers are reintegrating the labour market through jobs corresponding to their qualifications and aspirations, or, to use concepts closer to the idea of flexicurity under the European Employment Policy, their employability. This aspect is reinforced by the “flexiprecarious” character of the Spanish labour market in general, as expressed by high levels of temporality, involuntary part-time employment and minimum wages under the level prescribed by the European Social Charter. The more general insufficiency of ALMPs in the other analysed cases, above all in terms of training and prioritization of unemployed closer to the labour market, could also be assessed from that perspective, and found to create real segmentation between unemployed. There seems to be also interdependency between the segmentation of unemployed in terms of promoting their employability through ALMPs and the segmentation in the labour market itself, as expressed by the phenomenon of “circular mobility” of ALG II holders in the German system.

Focusing on the concept of suitable employment as a limit to the obligation of unemployed to reintegrate the labour market, the following observation could be made.

The legal notion of suitable employment should never be designed through a closed definition, or reduced to a mere degrading minimal acceptable wage scale. Public Employment Services, under possible review by jurisdictional organs, should always take into account (and be legally allowed to take into account) the different circumstances of the case, under the principle of proportionality. Such a framework should include different factors: the precarious character of the job offer, related to the skills and capacities of the unemployed, his or her participation in the reintegration process, his or her possibilities of access to genuine training or retraining programs (mirroring the obligation of the state under the right to work), his or her personal circumstances, etc... From that point of view, some forms of precarious work, like involuntary part-time work or short-term contracts should not be considered as suitable employment, above all if they do not conduce to sustainable reintegration within the labour market.

Dutch courts have already paved the way to such an approach. They applied it by analogy to the obligation of unemployed falling into the social assistance scheme to participate in reintegration measures.

The District Court of Arnhem, by a judgment of 8 October 2008, did annul the sanction imposed for not accepting a reintegration measure, considering that the municipality imposing the sanction on an unemployed with an academic background for his refusal to collaborate in the activities of public gardening and box packing imposed by his assigned training center had failed to make clear how those activities could have a positive impact on the reintegration of the unemployed in the labour market. Moreover in an *obiter dicta* the Court considered that the sanction may have violated article 4 of the ECHR (prohibition of forced labour), given that the activities at the base of the sanction were clearly not conducing towards regular reintegration in the labour market. At the basis of the acceptance, in principle, of work first practices by the Court lies the idea that social assistance presupposes a person to return to paid employment as soon as possible, like in the contributory unemployment system.<sup>116</sup>

This approach was confirmed by the Central Court of Appeal (*Centrale Raad van Beroep*) in a judgment of 8 February 2010, in a similar case.<sup>117</sup>

The Court confirmed that in applying a sanction, a proportionality test had to be held to assess possible violation of article 4 of the ECHR, in which four factors had to be taken into account: 1) the characteristics of the activity (job/training/...) in relation with the possibilities, qualifications, experience and family situation of the unemployed; 2) the duration of the period of unemployment; 3) the contribution of the activity towards integration into the labour market, 4) the severity of the sanction. Work-first activities should thus not unreasonably burden their target, be adapted to the individual situation and give perspectives on reintegration in the labour market.<sup>118</sup>

The Courts applied article 4 of the ECHR, but could eventually have applied article 1-2 of the European Social Charter, which provides for a “richer” definition of the freedom to freely choose an occupation.<sup>119</sup> As such they helped framed a concept of “meaningful activation” which corresponds to the idea of suitable employment as discussed before, and introducing the necessary proportionality test in assessing a notion of suitable employment, even in the case of unemployment protection systems obliging benefit

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<sup>116</sup> G. Vonk, “Hunger as a policy instrument? Some reflections on workfare policies and the prohibition of forced labour”, (Revised) Paper presented at the FIAN conference *The Netherlands and the Right to Food in National and International Perspective*, held in Utrecht 15 October 2007; G. Vonk and W. Zondag, “Passende arbeid: nog steeds een levend begrip?”, *Serie Onderneming en Recht*, n° 50, 2009

<sup>117</sup> A. Eleveld, “Arbeidsplicht, rechtvaardigheid en de grondslagen van het socialzekerheidsrecht”, in *Netherlands Journal of Legal Philosophy*, n° 41, 2012, 28

<sup>118</sup> *Ibidem*, 33.

<sup>119</sup> One of the reason might be the disputes around the lack of direct applicability of the European Social Charter.

holders to accept any legal employment, or, in the Dutch definition “generally accepted work”.

To remain in the sphere of the Dutch legal definition of suitable employment, it should be questioned if the reduction of that notion to “any employment” after 6 months, given the absence of changes in the definition itself, should be taken for granted. Under the perspective of suitable employment, the definition should remain open and should not immediately imply that workers have to accept jobs not corresponding to their qualifications, let alone employment which is to be considered as precarious. The obligation to have recourse to a proportional assessment, taking into account the circumstances of the unemployed, should also be able to open ways to reassess the obligation of unemployed falling into means-tested schemes to accept “any” employment, through taking into account the factor of the duration of unemployment, so as to limit said obligation at least to unemployed falling into such schemes because of lack of qualifying period to access contributory unemployment protection schemes, with “lighter” obligations in terms of accepting suitable employment.

Also, the open character of the notion, and the need to interpret it under the idea of proportionality should also have consequences on particular aspects of the function of suitable employment as limit to the reintegration or commodification of unemployed, further than its “economic” reserve-wage preserving character. Considering that precarious employment, due to the complexity of factors determining it, is to a certain extent gender-related, the interpretation of the notion of suitable employment (or, even, any employment under the means-tested systems), should be able to take into account the complexity of those factors. An illustration of this idea could be found in a decision of 2005 of a Spanish appeal court in social matters which refused to follow the doctrine established by the *Tribunal Supremo* at the basis of the refusal of care as a justification to refuse work. The *Tribunal Superior de Justicia de Galicia*<sup>120</sup> decided 1) that the refusal to participate in training had to be assessed under the same circumstances as the refusal of an adequate job offer (an approach which has also been adopted by the Dutch jurisprudence analysed here above), as the PES have to take into “account the personal and professional circumstances of the unemployed, his insertion itinerary, his work-life balance, the characteristics of the job offer, existence of transport as well as the characteristics of the local job markets” for all the obligation of the unemployed; and 2) that a worker having refused to participate in training because the participation would make it impossible to care for his child, because his wife was also following training, could not be sanctioned. More interesting even, the Court reinforced its interpretation by referring to ILO Convention 44 and, above all, ILO Recommendation

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<sup>120</sup> STSJ Galicia, 4 April 2005, AS 2005, 1460.



165, according to which family responsibilities of the unemployed have to be taken into account in the assessment of the suitable character of employment. To justify the reversal of jurisprudence in comparison to the criteria established by the *Tribunal Supremo*, the Court argued that the principle of the promotion of work-life balance, since the Law 39/1999 of 5 November of promotion of work-life balance of workers,<sup>121</sup> modifying disposition of labour law and social security law, is to be seen as a general criterion of interpretation in Labour Law and Social Law.

However, this position does not seem to be shared by other Spanish courts, which continue to interpret restrictively the obligation of unemployed along the lines of the 1990s jurisprudence of the *Tribunal Supremo*, creating problems of legal certainty, which have not been solved, given the absence of a new pronouncement of the latter on the matter.<sup>122</sup>

Those few examples show that there are practical implications of the interpretation of the notion of suitable employment under the international fundamental social rights framework (reinforced by a multilevel approach taking into account European Union law) which could limit the consequences of the trend to work-first orientation of unemployed protection systems. Generally seen, the legal definition of suitable employment as a limit to the obligation of reintegration in the cases analyzed, despite its restrictive character, remains open to interpretations potentially limiting the reintegration into the labour market under precarious circumstances, whether those circumstances being related to the characteristics of the employment itself, its potential to entrap workers in precariousness or other factors contributing to its precarious character.

## **6. Suitable employment as a right of unemployed and as an obligation of the state**

It has been seen that the notion of suitable employment, within a system, like the Spanish, of insufficiency of protection against unemployment, both in its active as in its passive aspects, loses its de-commodifying function. Above the individual level, in a context with 23% unemployment and understaffed Public Employment Services, it even loses its meaning, as it is only residually enforced. Within this context, it could be said that the reintegration in the labour market through precarious work operates simply

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<sup>121</sup> Ley 39/1999, de 5 de noviembre, para promover la conciliación de la vida familiar y laboral de las personas trabajadoras.

<sup>122</sup> M.A. Herrero Fernández, “Formación y percepciones por desempleo tras la Ley 35/2010, de 17 de septiembre, de medidas urgentes para la reforma del mercado de trabajo”, *Revista Doctrinal Aranzadi Social*, vol. 3, n° 15, 2010, 105-118

under the pressure of the huge “reserve army” represented by Spanish unemployed, and labour market regulation which, through its imbalance between security and flexibility, has created a model of “flexiprecarity”. The notion of suitable employment could however have a growing role to play in a future where activation, in all its aspects (orientation, placement, training and control of the obligations of the unemployed) is being externalized to private temporary employment agencies.

Within the two-tier unemployment protection models, illustrated by the Dutch and the German cases, the notion of suitable employment is limited through a double movement. The first movement is characterized by the legislative intents to gradually restrict it within the contributory unemployment protection scheme. The second movement is characterized by, on the one hand, the reduction of the maximum and average period of contributory unemployment protection, and on the other hand, the practical disappearance of the idea of suitable employment as a limit to the obligation of unemployed to reintegrate the labour market in the social assistance schemes. In that sense, the legal definition of the notion of suitable employment is part of the arsenal of negative activation of unemployed. It can also be conceptualised as the administrative disciplinary compensation for the existence of a reserve wage (due to lower unemployment rates), where the restriction of the notion has a clear influence on the precarisation of the workforce. In its more extreme expression, like in the German case, the practical disappearance of the notion of suitable employment, contributes to the creation of a certain type of underclass of workers entrapped in precarious employment and precarious unemployment protection, reproducing and alimentering the segmentation in the labour market.

Within this context, the reconstruction of the notion of suitable employment under an international fundamental rights framework brings us to the conclusion that the following elements have to be taken into account in its interpretation as a limit to the obligation of unemployed to reintegrate the labour market under precarious circumstances.

Suitable employment cannot be limited in a way that no consideration should be given to the qualifications and expectations of unemployed. Even if, in function of the duration of unemployment, jobs not corresponding to the qualifications could in principle not be refused without a sanction, other circumstances should always have to be taken into account. It is in this context that the different legal determinants of the precarious character of a job offered should be assessed and read in the light of the personal circumstances of the unemployed, permitting to take into account the different dimensions of precariousness.

Also, under fundamental social rights standards, reducing the idea of suitable employment to mere “legal” employment, not only for unemployed who fall into the means-tested schemes for lack of sufficient qualifying periods or

qualifying previous jobs, but also for long-term unemployed, should be considered as unacceptable.

The unacceptable character of such policies is even accentuated by the lack of genuine efforts of the state to provide for training and retraining to those unemployed. Given the fact that the policies of unemployment protection in the continental systems analysed show that the most enabling ALMP measures are oriented towards the rapid reintegration of the most skilled workers, to the detriment of workers showing more probability to end up in long-term unemployment, through different phenomena (privatization and application of principles of cost-benefit within PES), sanctions for the refusal by those unemployed to accept any employment appear even more illegitimate. Therefore, they should be reviewed taking into account those circumstances, would those policies be in accordance with the international fundamental rights framework.

The legal definitions of the notion of suitable employment in the three cases analysed here, even when reducing it to the idea of mere “legal” employment all contain an “escape” clause which should allow the legal, judicial or administrative actors to interpret it in a way which would limit the obligation to reintegrate the labour market in precarious circumstances, even if at first sight, the initial definition shapes the notion of suitable employment in a way which reinforces the negative activation aspects of the unemployment protection systems concerned. This configuration opens the way to take into consideration, not only the precarious character of the (refused or offered) job, but also the broader characteristics of the system of protection against unemployment in which the obligation to reintegrate the labour market inscribes itself.

Also, concentrating on suitable employment as a limit to the obligation of unemployed should not make us forget its “collective” dimensions, shedding light on the responsibilities of the state, under the current fundamental social rights framework, to devise policies on the demand-side of the labour market. This would also permit to exit the sphere of individual obligations of unemployed to focus the attention on the recalibration of employment policies towards genuine employability, which has gradually disappeared from the idea of flexicurity and the European Employment Strategy.

And this is not only important from the point of view of the de-commodifying character of unemployment protection policies, but also from the economic objectives of employment policies in general. As indicated by the ILO Committee of Experts, the notion of suitable employment also fulfils the economic goal of preserving the quality of the workforce and to prevent labour market policies “which would lead to deskilling of the national workforce and the substantial reduction of employment

opportunities for unskilled workers at the low end, pushing them into long-term unemployment and exclusion”.<sup>123</sup>

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<sup>123</sup> Committee of Experts of the ILO, “General survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization”, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 1B), 100<sup>th</sup> session of the ILO, 2011, 209

## **The controversies of the concept of "suitable employment" in Russia**

Nelli Diveeva, Elena Sychenko

### **Abstract**

The paper researches the notion of suitable employment as defined by the Russian legislation. We consider this concept in light of the Constitution of the Russian Federation and of the international instruments. This analysis leads us to conclusion that the regulations of suitable employment do not provide a reasonable and fair consensus between the individual characteristics of the citizen, his aspirations in the field of work and the interests of society, while special rules established for particular groups of people are discriminatory and in some cases might amount to the violation of the prohibition of forced labour and to infringing the right of the worker to free choice of the occupation.

### **1. Introduction**

The concept of suitable employment was elaborated to establish the involuntary nature of unemployment and the unemployed person's availability for the job.

In this paper, we will research the provisions of Russian law on suitable employment and evaluate it in light of international law. We will try to answer the question if these provisions correspond to the abovementioned aims or the legislator has worded them in a way to force unemployed to agree to any job proposed. The paper is divided into two parts: the first one will consider the provisions of Russian law on the subject and the practice of their implementation. The second part will analyse the compliance of Russian approach to the suitable employment with international law, in particular we will deal with the ILO documents, UN Covenant on Economic, Social and Cultural Rights (CESCR) the European Social Charter (ESCR) and the European Convention on Human Rights (ECHR) as well as the case-law of relevant international bodies.

### **2. The provisions of the Russian legislation**

Article 37 of the Constitution of the Russian Federation determines that everyone has the right to freely dispose of their abilities to work, choose their occupation and profession. These provisions make it possible to state

that, in exercising such freedom, each citizen determines for himself what kind of work will be suitable for him in each case, based on his life experience, professional skills, personal characteristics and aspirations. Thus, the term "suitable work" becomes exclusively subjective, of course, not allowing in this context to identify any objective criteria for its definition. Looking for such work, the citizen interacts with the employer, who actually exposes his subjective analysis of the employee's expectations, thereby forming a "demand-supply" in the labour market. This interaction remains in the subjective plane of the negotiation process of a particular employee and employer, conducted, of course, within the framework of the current labour legislation (principles, prohibitions, obligations, permits, etc.). In case of dissatisfaction with the actions of each other, the parties may apply to the judiciary, which will assess the development of mutual criteria proposed by the employee and the employer in a particular situation to a particular place of work.

At the same time, the same article 37 of the Constitution of the Russian Federation establishes the right to protection against unemployment, when the legislation on employment guarantees free assistance to citizens of the Russian Federation in the selection of suitable employment and employment through the mediation of the employment service. In the context of this social obligation of the State the criteria determining the suitable employment become objective and depend on the level of development of society, its aims, objectives, focusing in the same time on the main goal – the employment of a citizen. Ideally, the definition of suitable work, for the purposes of protection against unemployment in the legislation of each country, should find and reflect the consensus between the individual characteristics of the citizen and the interests of society.

The first question that needs to be answered in the analysis of the legislation of the Russian Federation is the question of the subjects who are guaranteed free assistance in the selection of suitable jobs and employment through the employment service. According to the preamble of the Law of the Russian Federation of April 19, 1991 N 1032-1 "About employment of the population in the Russian Federation" (henceforth - the Law on employment) guarantees of the state on implementation of the constitutional rights to work and social protection against unemployment are established only for citizens of the Russian Federation. In article 5 defining the state policy in the field of promotion of employment of the population, this postulate finds development through determination of the orientation of such policy on ensuring equal opportunities to all citizens of the Russian Federation irrespective of nationality, sex, age, social status, political convictions and the attitude to religion in realization of the right to voluntary work and free choice of employment. Thus, citizenship as a political and legal connection of a person with the state contributes to the adoption of

social obligations for employment by the latter and does not contribute to the implementation of such obligations in respect of foreign citizens and stateless persons residing in the territory of the Russian Federation.

The above-mentioned social obligation is realised on the basis of the Standard of the state service of assistance to citizens in search of suitable work<sup>1</sup> (henceforth - the Standard of the state service). The Decree of the Government of the Russian Federation of September 7, 2012 N 891 "About the order of the citizens' registration for the purpose of search of suitable work, the registration of the unemployed citizens and the requirements to the selection of a suitable work" establishes the procedures for the work of the employment service with those who seek employment and unemployed people.

Registration is carried out by public employment service at presentation of the citizen's passport of the Russian Federation or the document substituting it, and for the citizens belonging to category of disabled people, the individual program of rehabilitation and (or) habilitation of the disabled person issued in accordance with the established procedure and containing the conclusion about the recommended character and about working conditions, as well. Other documents are presented by the citizen at his discretion, however, the absence of such documents (confirming his working experience or education) will influence, among other things, the definition of work for him as suitable or unsuitable and for assigning / not assigning him to the category of "experiencing difficulties in finding a suitable job". At registration, the citizens are notified in writing that they are registered for the purpose of search of suitable work in public employment service.

Part 1 of article 4 of the Law on employment defines that such work, including work of temporary character which corresponds to professional suitability of the worker taking into account the level of his qualification, conditions of the last place of work (except for the paid public works), the state of health, transport accessibility of the workplace is considered suitable.

Part 4 of this article sets out mandatory provisions with regard to what kind of job cannot be considered suitable. It will not be suitable if: it is connected with the change of residence without the citizen's consent; the working conditions do not comply with the rules and regulations on labour protection; the proposed earnings are below the average earnings of a citizen calculated for the last three months at their last place of work.

In addition, part 3 of article 4 establishes evaluation criteria for suitable paid work, assuming their interpretation by the law enforcement agent – taking into account the age and other characteristics of citizens (however, it is

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<sup>1</sup> The Order of the Ministry of labour and social protection of the Russian Federation N 524, 13/11/2012.

necessary to clarify that these criteria apply only to certain categories of citizens in deciding whether they are required to pre-training).

Further we will analyze these criteria regarding their consistency with the national legislation.

The first criterion relates to the terms of the employment contract in the proposed suitable work. Such work can be offered both for an indefinite period or for a certain period (up to 5 years). Moreover, the term "work of a temporary nature", proposed by the legislator, suggests that work is also recognized as suitable for the duration of temporary (up to two months) work duties (Art. 59, Chapter 45 of the Russian Labour Code). In the latter case, it is hardly possible to state the fact of full employment of a citizen and protection against unemployment, although the state's obligation is considered fulfilled.

The second criterion of suitable work is the professional suitability of the employee, taking into account the level of his/her qualification. It is not a question of professional and qualification compliance of the work offered to the citizen only at his last place of work before the address to the body of employment service. Since the actual ability of a person to work is a condition of his/her legal personality as an employee, the employment service has the obligation to offer work options corresponding to any basic and/or additional professional and qualification qualities of a citizen, the experience and skills of his/her work, which were communicated by the citizen when applying to the relevant body. Such informing of employment service is carried out through a possible submission of documents on education, qualification, training, academic degrees and titles.

These data are compared by the employment service with the requirements of employers contained in the information on available jobs and vacant positions. Thus, the potential professional suitability of a citizen for particular employment is established and the work is defined as suitable/not suitable on the basis of the analyzed grounds. The last word remains, however, for the employer, who, within the powers established by labour law, assesses the employee's business qualities as suitable/unsuitable for him.

Taking into account the conditions of the last place of work of the citizen is the third criterion of suitable work. It should be noted that under such conditions, the current legislation refers only to wages. All other conditions are taken into account only in general through the prism of compliance with the rules and regulations on labour protection established by legislation. In this regard, the offer of work in harmful or dangerous working conditions will be considered as a suitable work (if it is not contraindicated for health reasons), the proposal of the travelling nature of work, work in several shifts will also be considered as a suitable work. It is not taken into account that the working conditions at the former place of work were different. It seems



that such an approach illustrates a too broad interpretation of suitable work so that the refusal of a citizen from such (for personal, family reasons) will entail the impossibility of recognizing him unemployed and obtaining appropriate social guarantees.

With regard to conditions such as wages, the employment Act establishes that work shall be read as appropriate if the proposed earnings are not lower than the average earnings of the citizen calculated for the last three months at the last place of work. It would seem that the legislation establishes a fair, efficient legal norm, which takes into account the needs of the person who lost his job. However, current Russian legislation virtually eliminates the positive, specifying that this provision does not apply to citizens whose average earnings exceeded the subsistence minimum of the able-bodied population defined in the subject of the Russian Federation. In this case, the Law on employment specifies that work cannot be considered suitable if the offered earnings are lower than the size of the living wage calculated in the subject of the Russian Federation in accordance with the established procedure. Thus, the legislator does not protect the right of an employee to the level of salary received before applying to the employment service, but absolutely unreasonably reduces the possible salary to the minimum subsistence level, considering such remuneration appropriate.<sup>2</sup> Moreover, if we turn to article 133 of the Labour Code, which States that the minimum wage is set simultaneously throughout the territory of the Russian Federation by Federal law and cannot be lower than the subsistence minimum of the able-bodied population<sup>3</sup>, the situation looks even more critical. It means that the Russian legislator actually believes that the establishment of wages by a potential employer at the level of the minimum wage translates any work into a category suitable from the point of view of such criterion as wages. That is, the professionalism of the employee, his/her qualification, work experience, etc. can be assessed in the same way as a person who does not have professional skills at all, since in the latter case, the salary for the proposed job also cannot be lower than the minimum wage in violation of labour law.

In all fairness, it should be noted that the analyzed rate of wage as criteria for a suitable job in employment Law has undergone significant changes, not of a positive nature, which led to this state of affairs. Initially, the law on employment correlated the salary for the proposed work with the average

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<sup>2</sup> For example, according to the Decree of the Government of St. Petersburg No. 963 of 27.11.2017, the subsistence minimum was defined in the sum of 10,791 rubles (about 154 euro). Thus any proposed job with the proposed salary in the sum more than 154 euro might be found suitable.

<sup>3</sup> The fact that according to Art. 421 of the Labor code the order and terms of step-by-step increase of the minimum wage to the size provided by part one of article 133 of this Code are established by the Federal law, essentially does not change provisions.

monthly salary of a citizen at the last place of work, and if his salary exceeded the average wage for the speciality in the region – not lower than this average salary. Thus, the level of remuneration achieved by the citizen, as well as the differentiation of wages by industry and professional qualification were guaranteed. Subsequently, the criterion of average regional earnings in the speciality was replaced by the criterion of average regional earnings, and in the future – the criterion of the subsistence minimum in the subject of the Russian Federation. Even in Russia at the beginning of the twentieth century, the unemployment insurance Regulation (1917) established a rule on finding work as suitable for wages, the norm of which was set by the relevant trade unions, based on the realities of economic life.

The fourth criterion of suitable work, defined by the Russian legislator, includes the transport accessibility of the place of work. The Law on employment establishes that the maximum distance of suitable work from the place of residence of the unemployed is determined by the employment service, taking into account the development of a public transport network in the area. However, as some Russian researchers rightly point out, when determining the maximum distance of suitable work from a citizen's place of residence, the criterion of transport accessibility of the workplace shouldn't be the only one used, but also the criterion of personal and family status of citizens, providing for disabled persons, single and large parents raising preschool children, persons of pre-retirement age and other privileged categories of citizens with a smaller maximum distance of suitable work from their place of residence than that provided for other categories of citizens<sup>4</sup>.

The state of health of a potential employee is the fifth criterion of suitable work –. In order to take this factor into account, the employment service must be provided with the relevant medical records by the person who is seeking employment. The application of this criterion applies not only to persons with disabilities and representing their individual rehabilitation and (or) habilitation programs. The criterion of the state of health involves taking into account a wide range of different circumstances: the presence of chronic diseases (the threat of their development), physical characteristics, age-related changes, etc. Such facts must be supported by the medical documents that the person concerned –the job seeker – must submit to the public employment service to be taken into account in assessing the proposed work as appropriate or inappropriate.

Thus, the criteria described together give the concept of "suitable employment" for citizens seeking such employment through public

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<sup>4</sup> Seregina L. V. "The concept of suitable work the employment legislation". *Labour law*. 2006, No. 3. Pp. 10 - 15.

employment services. The criteria set out in the legislation are not always perceived as a reasonable and fair consensus between the individual characteristics of the citizen, his aspirations in the field of work and the interests of society.

### **3. International approach to the suitable employment and Russian norms**

#### **3.1. ILO approach to suitable employment**

The review of international provisions defining the suitable employment will be started with the ILO instruments which provide a certain framework for shaping the concept of suitable employment:

1. ILO Convention on Employment Policy Convention, 1964, No. 122 (does not directly deal with suitable employment but provides some guidance);
2. ILO Convention on Employment Promotion and Protection against Unemployment Convention, 1988, No. 168 (establishes the criteria for suitable employment, but it was not ratified by Russia). These criteria are the following: the age of unemployed persons, their length of service in their former occupation, their acquired experience, the length of their period of unemployment, the labour market situation, the impact of the employment in question on their personal and family situation and whether the employment is vacant as a direct result of a stoppage of work due to an on-going labour dispute.

It is interesting to note that these factors were considered to be the indicators of suitable employment by the Committee of Experts on Social Security although the European Code of Social Security provides no definition of “suitable employment”. This committee, basing on a restrictive interpretation of suitable employment requested some states to cease applying concepts that were formulated in a very broad manner.<sup>5</sup>

3. ILO Recommendation on Employment Promotion and Protection against Unemployment, 1988 (No. 176). This document complements the list given in the Convention No. 186 with the remuneration factor (employment in which the conditions and

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<sup>5</sup> Jason Nickless, *European Code of Social Security Short Guide*. Council of Europe, 2002. p. 39.

remuneration are appreciably less favourable than those which are generally granted, at the relevant time, in the occupation and district in which the employment is offered, shall not be deemed suitable). It also establishes more links with the professional characteristics of the unemployed, recommending to take into account the abilities, qualifications, skills, work experience or the retraining potential of the person concerned;

The ILO Convention on Employment Policy Convention No. 122, as it was mentioned above, does not provide the definition of suitable employment but it is still a very important tool for the evaluation of the Russian concept. According to article 1, each Member shall declare and pursue, as a major goal, an active policy designed to promote full, productive and freely chosen employment. This policy, in particular, shall aim at ensuring that there **is freedom of choice of employment** and the fullest possible opportunity for each worker to qualify for, and **to use his skills** and endowments in, **a job for which he is well suited**, irrespective of race, colour, sex, religion, political opinion, national extraction or social origin. It is important to note that the Convention No. 122 according to the provisions of the Russian Constitution (art. 15) is directly applicable in Russia.

In our opinion, the proclaimed **freedom of choice of employment** and the opportunity for the worker to qualify for **a job for which he is well suited** with the reference to his **skills** and endowments establishes the criteria for the assessment of the suitable employment in the countries which ratified only ILO Convention No. 122.

In fact, in 1993 the Committee of Experts on the Application of Conventions and Recommendations (CEACR) issued an Observation in respect of Spain, where referred to the trade-unions' comments on the new definition of suitable employment. Trade unions alleged that it allowed an excessive extension of the concept likely to be applied in practice in a manner which is contrary to the objective of freely chosen employment.<sup>6</sup> Committee requested the Government to supply information on the implementation of this provision in relation to the principle of freely chosen employment.

Assessing the Russian concept of suitable employment in light of the principle of freely chosen employment as introduced by ILO Convention No. 122 we will conclude that this principle is violated in respect of certain groups of unemployed listed in the para. 3 of the article 4 of the Federal Act "On employment of population in the Russian Federation".

This paragraph lists those for whom any paid work, including temporary work and public works, requiring or not requiring (taking into account age

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<sup>6</sup> (CEACR) Observation - adopted 1993, published 80th ILC session (1993) Employment Policy Convention, 1964 (No. 122).

and other characteristics of citizens) preliminary training that meets the requirements of labour legislation will be found suitable. For the categories mentioned below the refusal of two “suitable jobs” will amount to the refusal to grant the status of unemployed (during 10 days after the registration as seeking employment) and will amount to a suspension of unemployment benefits for up to three months if such employment was refused twice during the period of unemployment.

Let us consider these groups consequently:

- 1) Unemployed who were dismissed more than once during one year preceding the beginning of unemployment for violation of labour discipline or other actions in the result of a fault.

The underlying logic for the expansion of the concept of “suitable employment” for this group is rather vague. If Russian Federation pursues according to the ILO Convention and its national law the policy of free chosen employment it is absolutely unacceptable to link the right for a suitable job with the person’s behaviour at previous works. The person does not become less qualified and does not lose the professional experience, skills, education if dismissed for misconduct. The only possible explanation for such regulation is to shorten the time of unemployment for such people at any expense. In our opinion, such approach constitutes an additional liability for this group of unemployed already punished for the misconduct at work by dismissal and violated the basic legal principle *Non bis in idem*.

- 2) Unemployed who terminated individual entrepreneurial activities or who withdrew from rural (farm) holdings.

The motivation of restriction of suitable employment for this “disadvantaged” group is even less comprehensive than in respect of the first group. The wording of this provision does not refer to any professional characteristics or any working experience, does not refer to the period of entrepreneurial activities or of the membership in rural (farm) holdings. The latter might at least provide some argumentation for the restriction linking the period of entrepreneurship with “out-of-job” periods. In our opinion, such restriction is a flagrant violation of the **freedom of choice of employment** and the denial of the opportunity for these people **to use his skills** and endowments in **a job for which he is well suited as provided in the ILO Convention No. 122**.

- 3) Unemployed seeking to resume work after a long (more than one year) break, and those who applied to employment service bodies after the end of seasonal work, as well as unemployed sent by the employment service to training and expelled for the misconduct;

In this group, the legislator united two very different types of the unemployed. The first one represents those who did not have a job for

a long period of time and are presumed to lose their qualification. The second reminds us the group of those who were dismissed from a job because of misconduct (see group 1 above) as the expansion of the concept of a suitable job for those who were expelled from training courses organized by employment service is a type of responsibility for such misbehaviour.

However, again this provision of law does not refer to the changes in the professional qualities of the worker. Some people might use the year of unemployment to learn new skills, to enhance their professional level during the free time. Let us imagine a lawyer who received a PhD in Labour law and did not get a job at the university during the year, using this time for research and making reports on international conferences. For him, once registered as unemployed, any proposed job will be suitable, including a part-time unqualified job. This example vividly demonstrates that the regulation of suitable employment not only violates the principles enshrined in the ILO Convention No. 122 but contradicts a fundamental value of international human rights law – the value of human dignity. The danger of such approach, citing Jason Nickless, is the erosion of skills as well as the impact on the mental health of the person concerned and the potential dissidence created in society as a whole.<sup>7</sup>

The research of Russian official statistics demonstrates that a great number of people are potentially affected by these provisions: almost 600 thousand people have terminated individual entrepreneurship and 17989 farm holdings finished their activities in 2016.<sup>8</sup> For all these people, once they apply for the status of unemployed to the Russian employment service, any job will be found suitable without any reference to professional qualities, education or experience of these people. This group of people becomes particularly vulnerable in the times of economic crisis and the state's approach to their protection from unemployment contributes more to drowning them rather than pulling out of a desperate situation. CEACR once noted that the concept of "suitable employment" has the role of protecting the professional and social status of job seekers during the prescribed initial period of unemployment.<sup>9</sup> Even though it was said in reference to the ILO Convention No. 168, which is not ratified by Russia, we believe that these words reflect the position of this authoritative body to the basics of employment policy:

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<sup>7</sup> Jason Nickless, *European Code of Social Security Short Guide*. Council of Europe, 2002. P. 37.

<sup>8</sup> Statistics on registration 01.01.2016-01.01.2017.  
[https://www.nalog.ru/rn77/related\\_activities/statistics\\_and\\_analytics/regstats/](https://www.nalog.ru/rn77/related_activities/statistics_and_analytics/regstats/) (accessed 20.02.2018).

<sup>9</sup> Direct Request (CEACR) - adopted 2011, published 101st ILC session (2012) Employment Promotion and Protection against Unemployment Convention, 1988 (No. 168) – Sweden.

**freedom of choice of employment** and the denial of the opportunity for these people **to use their skills** and endowments.

We suppose these provisions of Russian law considered above also raise two other fundamental points of concern. The difference in treatment of the listed groups in defining the suitability of employment proposed to them by the Employment services brings before us **the problem of discrimination**. The very broad definition of the suitable employment for these groups, without taking into account professional, personal or any other factors and the provision of legal responsibility for the second refusal of such job reminds us **the concept of forced labour**, prohibited by major international human rights instruments. These issues will be considered in the following paragraphs.

### **3.2. Discriminatory nature of the Russian concept of suitable employment**

Summing up our critics of the abovementioned provisions of Russian law in light of ILO Convention No. 122 we would like to focus on the issue of discrimination. This convention lists the prohibited grounds for the discrimination in the realisation of the freedom of choice of employment: race, colour, sex, religion, political opinion, national extraction or social origin. Social status or former business activities, the duration of unemployment are not included in this list. However, it does not mean that the difference in treatment of former entrepreneurs or the members of rural (farm) holdings, or those who did not have work for more than 12 months does not amount to discrimination.

In contrast with the ILO Conventions No. 122 and No. 111 on Discrimination (Employment and Occupation), which prohibited discrimination on the exhaustive list of grounds, UN Covenant on Economic, Social and Cultural Rights and the European Social Charter guarantee that the rights enunciated in these documents will be exercised without discrimination of any kind. We can refer to the worker's right to earn their living in an occupation freely entered upon (article 6 of the ICESCR and article 1 of the ESC). We can also refer to the European Convention on Human Rights, which, even though it does not fix the right to work, can be a very valuable instrument for consideration of the Russian concept of suitable employment in light of elaborated case law of the European Court of Human Rights (ECtHR) on discrimination. The ECtHR is the only international body on the European scene that can issue binding judgements and require the states to remedy discriminatory situations and to create effective systems of protection. Taking into account the fact that the prohibition of discrimination is equally relevant to the rights expressly set out in the ECHR

and to the rights which were integrated subsequently as the result of evolutive interpretation, the scope of antidiscrimination protections guaranteed by article 14 is very wide indeed. For example, it has been taken to cover the right of access to work through the broad interpretation of the right to respect for private life.<sup>10</sup>

The ECtHR established that it is enough for the discrimination in issue to "touch the enjoyment of a specific right or freedom,"<sup>11</sup>; in other words, "the facts should fall within the ambit of one or more of the substantive provisions of the Convention and its Protocols."<sup>12</sup> We suppose that the expansive interpretation of suitable employment for the groups of unemployed mentioned in the first paragraph falls within the ambit of at least three article: prohibition of forced labour (article 4); the right for respect to private life (article 8) as it includes the protection of the moral, psychological and physical integrity of the person<sup>13</sup> and protection of the rights to personal development.<sup>14</sup> Our case also might fall within the ambit of property right (article 1 of the protocol 1) as far as the second refusal of "suitable employment" proposal will lead to the refusal to grant the status of unemployed or to the suspension of unemployment benefit. But let us consider the difference in treatment of those groups in the light of article 8.

Taking for granted that the right to personal development is protected under article 8 as well as the right to establish relationships with others, including relationships of a professional nature<sup>15</sup> it is evident that forcing our PhD holder to accept a work as a cleaner under the menace of refusal to grant the status of unemployed or, if already registered, to suspend the payments of unemployment benefits, violates both rights. Consideration of discrimination cases at ECtHR includes several steps: the establishment of the difference in treatment; the research of an "objective and reasonable justification" for discriminatory provisions that exists if the difference of treatment pursues a legitimate aim and if there is a "reasonable relationship of proportionality between the means employed and the aim sought to be realised."<sup>16</sup> Returning now to the list of those for whom any employment would be suitable without relevance to experience, qualification, we will consider these provisions applying the approach of the ECtHR. Is there a

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<sup>10</sup> ECtHR, *Sidabras and Dziautas v. Lithuania* (55480/00 59330/00) 27/07/2004, *Bigaeva v. Greece* (26713/05) 28/05/2009.

<sup>11</sup> ECtHR, "Relating to certain aspects of the laws on the use of languages in education in Belgium" *v. Belgium* (1474/62 et al) 23/07/1968, para. 4.

<sup>12</sup> ECtHR, *Okpysz v. Germany* (59140/00) 25/10/2005, para. 30, *Willis v. THE UK* (36042/97) 11/06/2002, para. 36.

<sup>13</sup> ECtHR, *Brincat and others v. Malta*, *Raninen v. Finland* (20972/92) 16/12/1997; *Kyriakides v. Cyprus* (39058/05) 16/10/2008.

<sup>14</sup> ECtHR, *Oleksandr Volkov v. Ukraine* (21722/11) 09/01/2013, para. 65.

<sup>15</sup> ECtHR, *C. v. Belgium* (21794/93) 07/08/1996, para. 25.

<sup>16</sup> ECtHR, *Adrejeva v. Latvia [GC]* (55707/00) 18/02/2009, para. 81.



difference in treatment in the determination of suitable employment of those who withdrew from farmer holding (terminated individual entrepreneurial activities/was dismissed for misconduct and so on)? Evidently there is, as the concept of suitable employment for them will be much broader including any job, while in respect of other unemployed (not listed in our para. 2.1.) suitable job will be determined with the consideration of professional qualities, taking into account the level of his qualifications, the conditions of the last place of work. Whenever a difference in treatment is found, the ECtHR has to determine if there was an objective and reasonable justification. According to the jurisprudence under article 14, “objective and reasonable justification” means that the discrimination in question pursued one or more legitimate aim(s) and there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The only legitimate aim that might be referred to in the “suitable employment” case is the need to ensure the balanced budgetary system and ensuring full employment. As to the first aim, it is not relevant in our case as unemployment benefits are non-contributory payments, thus there is no justification for restricting the rights of those who were not engaged in employment before the period of unemployment. The second aim should be spread to all the unemployed and therefore does not justify the difference of treatment. This brief analysis brings us to the conclusion that the difference in treatment of those groups of unemployed does not have a legitimate aim and therefore violates the prohibition of discrimination under the European Convention on Human Rights in conjunction with article 8.

### **3.3. The concept of suitable employment in the light of prohibition of forced labour**

We suppose that the situation in Russia when a great number of people have to accept any job proposed by the employment service without consideration of their profession or family responsibilities might fall to a certain extent in some circumstances within the ambit of the prohibition of forced labour.

A number of international instruments fix the prohibition of forced labour. ILO, which was the first body to adopt a special convention on forced labour already in 1930, defines it as *all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily*. On several occasions, CEACR has observed

that the loss of the right to benefit under certain conditions might be equivalent to a penalty within the meaning of the Convention.<sup>17</sup>

The prohibition without the definition of what forced labour is may be found in the International Covenant on Political and Civil Rights and the ECHR. Human Rights Committee (HRC) once considered the complaint on the suspension of unemployment benefit in the light of the prohibition of forced labour.

In *Fauvre v. Australia* the Committee interpreted the term "forced or compulsory labour" as covering a range of conduct extending from labour imposed on an individual by way of criminal sanction, notably in particularly coercive, exploitative or otherwise egregious conditions, to lesser forms of labour in circumstances where punishment as a comparable sanction is threatened if the labour directed is not performed. It further referred to the civic obligations which did not amount to forced labour if did not have a punitive purpose or effect, were provided for by law in order to serve a legitimate purpose under the Covenant. This stance demonstrates that the Committee was likely to see the obligation to accept any job in order to be eligible for unemployment benefit as a civic obligation. However, such an obligation should have a legitimate aim, be lawful and without a punitive purpose or effect. In the previous paragraph, we have considered if the difference in treatment of people for whom any job would be found suitable had a legitimate aim and concluded that it did not. The same conclusion is equally relevant when estimating the situation in the light of the conclusions of the HRC. Therefore, even if the need to accept any second job as suitable might be considered as a civic obligation under the ICPCR, the lack of the legitimate aim leads to the conclusion that it is a form of forced labour.

It is interesting to compare the approach of HRC with the views of the ECtHR and the former European Commission on Human Rights, which had a number of opportunities to deal with this question:

In 1976 an unemployed specialised building worker complained to the Commission that the obligation imposed on him to accept, in order to receive unemployment benefits, a job offer not in conformity with his qualifications, constituted 'compulsory labour'. Rejecting this complaint, the Commission observed that he was not compelled, by any penalty, to accept such an offer; nor would his refusal constitute an infringement of the law. A refusal would only be penalised by the temporary loss of unemployment

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<sup>17</sup> Direct Request (CEACR) - adopted 1995, published 82nd ILC session (1995) Forced Labour Convention, 1930 (No. 29) – Chile; Direct Request (CEACR) - adopted 1992, published 79th ILC session (1992) Forced Labour Convention, 1930 (No. 29) – Chile.

benefits.<sup>18</sup> The same conclusion was reached later in the case *Talmon v. The Netherlands*.<sup>19</sup> The applicant, a scientist, complained that the reduction of unemployment benefits for the refusal to perform required work, to which he had a conscientious objection, amounted to forced labour. The Commission declared the application inadmissible as it did not find that the applicant was in any way forced to perform any kind of labour or that his refusal to look for other employment than that of an independent scientist made him liable to any measures other than the reduction of his unemployment benefits.

The ECtHR applied the same approach in considering the complaint of an unemployed philosopher who claimed that due to changes in the relevant legislation she was forced to seek and take up employment which was deemed to be 'generally acceptable' as opposed to being 'suitable', stipulated in the previous legislation.<sup>20</sup> In that case, the ECtHR stated that the obligation to accept any kind of work was in effect a condition for the granting of benefits, and the State, which had introduced a system of social security, was fully entitled to lay down conditions which have to be met for a person to be eligible for benefits under that system. The ECtHR emphasised that Dutch legislation provided that recipients of benefits were not required to seek and take up employment which was not generally socially accepted or in respect of which they had conscientious objections.

This stance of the ECtHR demonstrates that the approach of the Strasbourg bodies to the issue has changed with time. In spite of the recognition of a wide margin of appreciation of the States in establishing the social security system, certain positive obligations of the State might be deduced. We suppose that the State, establishing eligibility conditions for unemployment benefits, might be required to ensure that the work proposed to be given to an unemployed person, in circumstances where refusal to accept the job will lead to sufficient reduction or abolition of the relevant allowance, is not be in breach of his freedoms of religion, conscience and belief and is not generally socially unacceptable.

Considering our imaginary case of a PhD holder in light of these findings we can hardly allege that the ECtHR might find a violation of article 4 in this case. Considering the job of a cleaner from the point of view of social stereotypes it cannot be found unacceptable. However, adding to this analysis a personal dimension we can argue that accepting non-skilled employment by a highly qualified person is socially unacceptable.

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<sup>18</sup> ECtHR, *X v. Netherlands*, Application 7602/76, (1976) 7 Decisions and Reports 161, cited from [Nihal Jayawickrama](#), *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence*, Cambridge University Press, 2002. P. 362.

<sup>19</sup> EurCommHR, *Talmon v. The Netherlands* (30300/96) inadmissible 26 February 1997.

<sup>20</sup> ECtHR, *Schuitemaker v. The Netherlands* (15906/08) inadmissible 04/05/2010.

Let us now consider Russian provisions in light of the European Social charter which also has relevance to this issue as it protects the right of the worker to earn his living in an occupation freely entered upon.

According to the interpretation of this right by the European Committee of Social Rights, the imposition of excessively strict conditions for receipt of unemployment benefit may be regarded as a violation. The ECSR treats excessive conditionality in social security law as a form of compulsion that is compatible with Article 1§2 only if the resulting employment is 'consistent with the dignity of the individual concerned and [their] family responsibilities' or, more generally, can be regarded as 'non-exploitative'.<sup>21</sup> We suppose that the provisions considered in this part of the paper cannot be interpreted differently than as imposing of excessively strict conditions for receipt of unemployment benefit and are evidently not consistent with the dignity of these groups of unemployed.

The Russian Government was asked by the ECSR to provide the explanation of the system of suitable employment in Russia. It responded in 2017 describing the general approach, which takes into account the level of qualification, the conditions of the last place of work. They did not mention the exceptions considered in this paper which cover a great number of people.<sup>22</sup> By concealing this important information the Government tried to demonstrate that the conditions of suitable employment do not amount to a restriction of freedom to work.<sup>23</sup> However, as it was demonstrated in this paper, they do.

#### 4. Conclusions

Summing up our analysis we conclude that Russian provisions on suitable employment do not provide a reasonable and fair consensus between the individual characteristics of the citizen, his aspirations in the field of work and the interests of society. Special rules for several groups of unemployed, obliging them to accept any second job proposed under the menace of unemployment benefit suspension (or the refusal to grant the status of unemployed as far as those who are registers as seeking employment are

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<sup>21</sup> S. Deakin, "The right to work" ", in N. Bruun, K. Lörcher, I. Schömann, S. Clauwaert(eds) *The European Social Charter and Employment Relation*. Bloomsbury Publishing, 2017. P. 159.

<sup>22</sup> Conclusions 2017 - Fédération de Russie - article 12-1, 2017/def/RUS/12/1/FR , 08/12/2017.

<sup>23</sup> In the previous conclusions the Committee pointed that in certain cases and under certain circumstances the loss of unemployment benefits on grounds of refusal to accept offered employment could amount, indirectly, to a restriction on the freedom to work. Conclusions 2012 - Russian Federation - Article 1-2 2012/def/RUS/1/2/EN, 07/12/2012.

concerned) are not in conformity with the ILO Convention No, 122, ratified by Russia. These norms are discriminatory in nature and thus violate the ESC and the ECtHR. In certain individual cases, they might be interpreted as violating the prohibition of forced labour (ICPCR and the ECtHR) and infringing the right of the worker to free choice of the occupation (ESC).



## **The European Pillar of Social rights and the instrumentalization of the right to adequate minimum income benefits**

Anja Eleveld

### **Abstract**

With the European Pillar of Social Rights, which was proclaimed and signed in the Fall of 2017 the EU continues to connect the goal of inclusion in the labour market to the protection of basic social rights. This paper critically examines this relationship. It argues that the European Commission favours employment policies over minimum income policies alongside the observation that the European Commission ignores the potential negative effects of financial sanctions that are imposed on welfare recipients who fail to comply with work-related obligations (work-related sanctions) on the access to adequate minimum income benefits. That is, minimum income policies have become, above all, an instrument of broader employment policies. In response to these developments, this chapter establishes a social rights perspective on the ‘activating features’ of minimum income policies. This implies that it takes into account that financial incentives aiming to stimulate welfare recipients to (re)integrate to paid work, may negatively affect their income and - as a result - their right to a minimum means of basic subsistence.

Departing from this social rights perspective, the chapter compares the characteristics of national social policies and social protection systems of member states that have stipulated relatively *high* work-related sanctions with countries that have stipulated relatively *low* work-related sanctions. For this purpose, this chapter constructs a sanction indicator which quantifies work-related sanction provisions in social assistance legislations in 22 EU member states. The results of the analysis show that member states that have legislated relatively high work-related sanctions tend to spend less money on social protection, in particular, regarding benefits and provisions that reduce the risk of poverty rate. In addition, the investments of these member states in enabling policies are considerable lower compared to member states that have legislated relatively low work-related sanctions. Also, the access to the threshold of 50% of the median set by the European Committee of Social Rights is less well secured in member states that have adopted high work-related sanctions, compared to member states that have adopted low work-related sanctions. These conclusions urge the European Commission to develop a genuine social rights perspective on the European Pillar of Social Rights which seriously considers the amount of social assistance benefits

and the extent to which work-related sanctions affect the access to a minimum income in EU member states.

## 1. Introduction

On 17 November 2017 during the Gothenburg Social Summit for fair jobs and growth, the Council of the EU, the European Parliament, and the Commission proclaimed and signed the European Pillar of Social Rights.<sup>1</sup> According to the preamble, the Pillar aims to ‘serve as a guide towards efficient employment and social outcomes when responding to current and future challenges which are directly aimed at fulfilling people’s essential needs, and towards ensuring better enactment and implementation of social rights’.<sup>2</sup> This aim is further elaborated in article 14 of the Pillar (minimum income) which stipulates:

“Everyone lacking sufficient resources has the right to adequate minimum income benefits ensuring a life in dignity at all stages of life, and effective access to enabling goods and services. For those who can work, minimum income benefits should be combined with incentives to (re)integrate into the labour market”.

This provision fits with the EU policies of “active inclusion” that – like the European Pillar of Social Rights – connects the goal of inclusion in the labour market to the protection of basic social rights.<sup>3</sup> This paper critically examines this relationship. It argues that the European Commission continues to favour employment policies over minimum income policies alongside the observation that the European Commission ignores the potential negative effects of financial sanctions that are imposed on welfare recipients who fail to comply with work-related obligations (work-related sanctions) on the access to adequate minimum income benefits. That is, minimum income policies have become, above all, an instrument of broader employment policies. In response to these developments, this chapter establishes a social rights perspective on the ‘activating features’ of minimum income policies. This implies that it takes into account that financial incentives aiming to stimulate welfare recipients to (re)integrate to

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<sup>1</sup> For the text see Council of the European Union, Brussels 20 October 2017 (13129/17), Proposal for an Interinstitutional Proclamation on the European Pillar of Social Rights. The European Pillar of social rights functions as an evaluative framework for member states: it enables member states to test their employment rules and social policies against the Social Rights Framework established by the European Commission. As such, the Pillar establishes a frame of reference for the EU member states.

<sup>2</sup> Ibid, preamble 12.

<sup>3</sup> Commission Recommendation of 3 October 2008 on the active inclusion of people excluded from the labour market, OJ L 307/11, 18 November 2008.



paid work, may negatively affect their income and - as a result - their right to a minimum means of basic subsistence.

Departing from this social rights perspective, the chapter compares the characteristics of national social policies and social protection systems of member states that have stipulated relatively *high* work-related sanctions with countries that have stipulated relatively *low* work-related sanctions. For this purpose, this chapter constructs a sanction indicator which quantifies work-related sanction provisions in social assistance legislations in 22 EU member states.<sup>4</sup> In previous research, I have revealed that recipients living in high sanctioning countries tend to experience more material deprivation compared to recipients living in low sanctioning countries.<sup>5</sup> In line with these outcomes I hypothesize that member states that have legislated high work-related sanctions for recipients of social assistance (which in the context of EU policies are exclusively viewed as ‘incentives’) have adopted less protective social systems compared to member states that have legislated relatively low work-related sanctions.

This chapter is organized in the following way: section 2 examines the European Policies of Active Inclusion which paved the way for article 14 of the European Pillar of Social Rights. Section 3 explains the data used for the construction of the sanction indicator. Section 4 constructs a sanction indicator for 22 EU member states. Section 5 considers some explanations for the legislation of either high or low work-related sanctions in EU member states. Section 6 compares the characteristics of social policies of member states with relatively high and low work-related sanctions. Section 7 examines Conclusions of the European Committee of Social Rights (ECSR) on the adequacy of social assistance benefits of the selected EU member states and compares this data with the height of work-related sanction in each of these countries. The final section (8) contains the conclusion of this chapter.

## **2. The EU policies of active Inclusion: an instrumentalist perspective on human social rights**

Art. 14 of the European Pillar of Social Rights reveals a connection between (re)integration policies and the right to an adequate income. The relationship between these, in fact, distinct policy areas was established for the first time

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<sup>4</sup> This sanction indicator is more refined than that used in previous studies E.g. A. Eleveld, Work-related sanctions in European welfare states: an incentive to work or a violation of minimum subsistence rights, ACCES Europe Research Paper Series, no. 2016/01; A. Eleveld, “Activation policies: policies of social inclusion or social exclusion”, *Journal of Poverty and Social Justice*, Vol. 25, 2017, pp. 277-285.

<sup>5</sup> Ibid.

in the 1990s with the development of EU policies of social inclusion. However, since then the focus has been put on employment policies - ‘the inclusion of EU citizens in the labour market’-, in particular since the adoption of the Lisbon strategy in 2000 and its mid-term review in 2004. This changed in 2008 when the European Commission adopted the policies of *active inclusion* which sought to (re)connect the goal of inclusive labour markets with the goal of an adequate income support, and access to social services such as employment and training services.<sup>6</sup> As such, the policies of *active inclusion* united two policy areas which had become increasingly separated during the preceding decade: the European Employment strategy (EES), focusing on labour markets; and the social Open Method of Coordination on social inclusion, focusing on deprived living situations.<sup>7</sup> The joint focus on income support and employment policies has been continued in the Europe 2020 strategy<sup>8</sup> and - as said - has become part of the recent European Pillar of Social Rights.

Regarding these developments in EU social policies, the EU policy documents on active inclusion are crucial for understanding the meaning of art. 14 of the European Pillar of Social Rights. Therefore, this section examines some key policy documents on active inclusion. In the first document, adopting policies on active inclusion, the Commission stated that the goal of adequate income support entails ‘the individual’s basic right to resources and social assistance sufficient to lead a life that is compatible with human dignity as part of a comprehensive, consistent drive to combat social exclusion’.<sup>9</sup> Hence, in addition to employment policies, a basic right to a minimum income was viewed as an important means to achieving social inclusion. At the same time, the Commission clarified that the right to adequate income should not be understood as an unconditional right to a minimum income, but that the right to social assistance should be interpreted in keeping with EU’s employment policies. In this context, the Commission referred to the requirement of safeguarding ‘an incentive to seek employment for people whose condition renders them fit for work’.<sup>10</sup> In

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<sup>6</sup> See note 3. According to the Commission Recommendation, *active inclusion* policies consist of three pillars: (a) adequate income support; (b) inclusive labour markets; and (c) access to quality services.

<sup>7</sup> Regarding the goal of adequate means of subsistence, see the Council Recommendation 92/441/EEC of 24 June 1992 on common criteria concerning sufficient resources and social assistance in social protection systems (OJ L.245/46).

<sup>8</sup> For example, the ‘flagship initiatives’ refer to both increased labour participation and access to social rights. See communication from the Commission, Europe 2020, A strategy for smart, sustainable and inclusive growth, 3 March 2010, COM (2010) 2020 final. Also see Commission Staff Working Document. Social Investment Package. 20 February 2013, SWD (2013) 39 final, pp. 4-5.

<sup>9</sup> See note 3.

<sup>10</sup> See note 3.

short, for the Commission, the goal of ‘inclusive labour markets’ was to be achieved by both enabling policies and financial incentives (i.e. work-related sanctions in social benefits schemes) aiming at the activation of recipients of social benefits.

Notwithstanding that the EU policies of *active inclusion* supplemented previous focus on employment strategies with a social rights perspective, the follow-up documents (including the European Pillar of Social Rights) fail to mention potential adverse consequences of such “financial incentives” on adequate income support.<sup>11</sup> Indeed, these documents argue that “[t]he level [of minimum income schemes] should be high enough for a decent life and at the same time help people to be motivated and activated to work”.<sup>12</sup> In other words, the level of income support is (also) viewed as an incentive to work, in that it should not be too high (as this encourages inactivity), indicating that for EU policies of active inclusion work-related sanctions are, above all, a reasonably efficient means to encourage recipients (of social assistance) to work.

The academic literature on EU social policy seems to have adopted a similar view on work-related sanctions. For example, scholars such as Marchal and van Mechelen,<sup>13</sup> have classified work-related sanctions in minimum income schemes exclusively as an instrument of inclusive labour markets, while ignoring the possible adverse effects these instruments may have on the goal of adequate income support (as part of EU policies of active inclusion). Their research does not pay attention to the possibility that work-related sanctions may produce income below the poverty line for a sanctioned recipient.

If we interpret Art. 14 of the European Pillar of Social Rights along the lines of EU policies of active inclusion, it could be argued that a fundamental social human right - the right to a basic means of subsistence - has become an instrument of governing people’s behaviour. To put otherwise, the right to minimum income benefits is only acquired on the condition that the

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<sup>11</sup> See the follow up documents of the Council Recommendation: (1) Communication from the Commission. The European platform against poverty and social exclusion: A European framework for social and territorial cohesion, SEC (2010) 1564 final, p.6; (2) Commission Staff Working Document. Social Investment Package. 20 February 2013, SWD (2013) 39 final, p.13; (3) Communication from the Commission. Towards social investment for growth and cohesion, 20 October 2013. COM (2013) 83 final, p. 10.

<sup>12</sup> Communication from the Commission. Towards social investment for growth and cohesion, 20 October 2013. COM (2013) 83 final, p.19; also see Commission Staff Working Document. Social investment package, 20 February 2013, SWD (2013) 39 final, p. 10.

<sup>13</sup> S. Marchal and N. van Mechelen, “A new kid in town? Active inclusion elements in European minimum income schemes”, *Social Policy & Administration*, Vol 51, 2017, pp. 171-194. These authors have used the concept of *active inclusion* to evaluate activation policies in the context of broader welfare policies of EU Member States.

recipient ‘behaves well’. This view, which I name the ‘instrumentalist perspective’ also seems to constitute the main paradigm in national activation policies: welfare recipients are eligible for social assistance benefits on the condition that they comply with work-related obligations. The problem with this instrumentalist perspective is that it ignores the created risk of violating the right to a minimum means of subsistence and other basic human rights. Then, from this limited perspective, it is hard to recognize (1) that the reduction or even withdrawal of benefits due to the imposition of work-related obligations -may leave the recipient in poverty; and (2) that these work-based obligations increase the risk of the unemployed of being subjected to abuse of arbitrary power (e.g. the dependency on the welfare state manager and workfare supervisors) and (the subsequent) violations of dignity. In short, from the instrumentalist perspective, the view on work-related sanctions is narrowed down to an assessment on behavioural effects. Contrastingly, this article builds on a social rights perspective that does not consider a work-related sanction as an incentive but in relation to a genuine right to a minimum means of subsistence. The differences between the instrumentalist perspective and the social rights perspective on activation policies are summarized in table 1.

**Table 1: Different perspectives on activation policies**

Instrumentalist perspective	Social rights perspective
‘Neutral’ instrumentalist approach to activation policies	Normative approach to activation policies
Focus on labour market participation	Focus on social rights protection
The fundamental right to a basic means of subsistence as an instrument for the activation of people: only welfare recipients complying with work-related obligations are eligible for social assistance benefits of the last resort	It is acknowledged that activation policies can also have adverse effects i.e. the violation of specific social rights

### **3. The data**

In order to compare national social protection systems of EU member states and the strictness of financial sanctions, the research project aimed at gathering data on the sanctioning system of social assistance in as many EU member states as possible. This section explains how the member states were selected (3.1). Consequently, it goes on to provide some country specific remarks with respect to their system of social assistance benefits (3.2) and an explanation of the questionnaire (3.3).

#### **3.1 The selection of the countries**

The questionnaires completed by legal and social policy specialists for 22 EU member states (see appendix 2) are the main source for this chapter. It was our intention to investigate the level of sanctioning in all EU Member States. However, during the term of the research, it was not possible to find legal specialists for Latvia. In addition, Malta and Hungary were excluded, because the available data were not clear enough for the aim of this study. Cyprus was also excluded, because at the time of the research the new social assistance legislation Law had only recently been implemented and there were no guidelines; internal decrees and/or jurisprudence in place for answering the questions in a satisfying way. Greece was excluded because it did not regulate social assistance benefits for able-bodied people. Finally, we decided to exclude Spain for the analysis in this article, since Catalonia, the region we had selected (in Spain social assistance benefits are regulated at a regional level), had since the reform of 2011 limited social assistance benefits (PRIMI benefits) to people with special and additional needs.<sup>14</sup>

As a result, the country selection includes 22 EU Member States: Austria (AT), Belgium (BE), Bulgaria (BU), Czech Republic (CZ), Germany (DE), Denmark (DK), Estonia (EE), Finland (FI), France (FR), Germany, Croatia (HG), Ireland (IE), Italy (IT), Lithuania (LT), Luxembourg (LU), the Netherlands (NL), Poland (PL), Portugal (PT), Romania (RO), Slovenia (SI), Slovakia (SK), Sweden (SE), and the United Kingdom (UK).

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<sup>14</sup> The data of Spain and data of European States which are not a member of the EU (Norway and Switzerland) were used for other publications (e.g. see publications mentioned in note 4).

### **3.2 Some country specific remarks concerning non-contributory social assistance benefits**

In most countries social assistance benefits are regulated at the national level. However, in some countries social assistance benefits are partly or entirely regulated at a regional or local level. In Austria social assistance benefits are entirely regulated at the local level. For this member state, therefore, the regulations of the city of Vienna were examined. In addition, there were some countries that (partly) regulate social assistance benefits at the local level. For example, in Lithuania hardship provisions are regulated at the local level. Therefore, for this country, the regulations for Vilnius were also examined. In Romania, social assistance benefits are partly regulated at the municipal level in the form of emergency benefits.<sup>15</sup> However, regarding the (very) temporary character of these benefits, they were not included. In Italy social assistance benefits are partly regulated at the regional level. The regulations of the municipality of Milan were studied, but it was decided not to include these regulations in the research, because it only offers one relatively small sum for the unemployed who participate for six months in an activation project.<sup>16</sup>

Three investigated member states have adopted rather limited social assistance schemes for able-bodied people. In Italy people are only eligible for social assistance benefits if they are unemployed and at least one member of the household is under the age of 18, or over 55 and does not (yet) qualify for a retirement scheme. In Bulgaria able-bodied people are only eligible for social assistance benefits after a waiting period of six months; and in Croatia, able-bodied people are eligible for social assistance benefits for a maximum period of three years. People can only re-apply for social assistance benefits after a period of three months.

### **3.3 The questionnaire**

The completed questionnaires were the main source for this report. The country specialists were asked to fill out the questionnaires for the situation at 1 January 2015.<sup>17</sup> With respect to some countries, some additional research was conducted by examining the (translated) text of the relevant legal regulations. This was the case with the Czech Republic, France, Ireland, Luxembourg, and Poland.

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<sup>15</sup> Emergency benefits cover accidents, health issues, home depreciation due to calamities or other unforeseen events. These benefits will be sanctioned in case the recipient does not fulfill work-related obligations.

<sup>16</sup> See *Patti per il riscatto sociale* (Milan) (*Pacts for the advancement of social conditions*).

<sup>17</sup> With the exception of Italy where we also considered some important legislative changes in 2015.

The questionnaire contained questions on financial sanctions which, according to the national or regional legislation on non-contributory social assistance, can be imposed on recipients of social assistance who fail to fulfil one or more of the work-related requirements:

- (1) register with an employment office;
- (2) sign an integration or insertion contract;
- (3) comply with job research requirement;
- (4) participate in a job community programme;
- (5) participate in a training programme;
- (6) participate in an employment programme;
- (7) other.

This paper refers to a work-related fault where the recipient of social assistance fails to fulfil one of these requirements. Initially the questionnaire distinguished between the ‘termination’, ‘suspension’ and ‘reduction’ of the benefits. However, whereas during the research this term appeared to be multi-interpretable, the category of ‘suspension’ was replaced by ‘termination’ or a ‘reduction of 100%’, dependent on the country specific meaning of ‘suspension’. ‘Termination’ means that the benefits are withdrawn and that the former recipient must re-apply for the benefits. A ‘reduction of 100%’ means that the recipient does not receive his or her social assistance benefits for a specific period. However, in contrast to ‘termination’, the recipient does not have to re-apply for the benefits.

#### **4. The sanction indicator**

In order to construct the sanction indicator, data from the questionnaire were categorized. Based on this categorization, I was able to formulate the most important indicators depicting the variety of sanctions. Contrary to previous analyses, I refined the indicators, as a result of which the number of indicators increased. In addition, unlike previous analyses, I decided to limit the indicators to those indicators which are directly related to the span and level of the sanction and to recidivism,<sup>18</sup> which arguably has contributed to the clearness of the indicator.

In some countries, different sanctions apply depending on the kind of work-related fault.<sup>19</sup> For example, in Denmark, the benefits will be reduced for the

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<sup>18</sup> In previous analyses (see note 150) the degree to which sanctions could be mitigated were included as an element of the sanction indicator.

<sup>19</sup> This was the case for Bulgaria, Denmark, Italy, Lithuania, the Netherlands, Slovakia, Spain, and the UK.

days the recipient failed to participate in one of the prescribed activities.<sup>20</sup> The benefits are instead reduced by 3/20 of the monthly payment where the recipient ceases an educational activity without good reason;<sup>21</sup> or, if s/he rejects an employment activity, social benefits may be terminated immediately.<sup>22</sup> Whereas the goal of this article is to examine the relationship between work-related sanctions and the access to social rights, it was decided to focus only on work-related fault(s) as a result of which the highest set of sanctions were imposed. The following countries have adopted different (sets of) financial sanctions, depending on fault: Bulgaria, Denmark, Lithuania, the Netherlands, Slovakia, the UK. For these countries we only examined those work-related faults for which the highest sanction was legislated.

As shown in Table 1, various criteria were considered, including the number of work-related, sanctioned behaviour; recidivism; period of reduced or terminated benefits; percentage of benefit reduction; and the flexibility of the periods and percentages of reduction. To calculate a sanction indicator for each country, each indicator counted for one point. Elements 6 and 7 counted double (termination or a reduction of 100% after a first, second or third fault for a fixed period of respectively six months or more and one year or more) in order to give sufficient weight to these harsh provisions relatively to other provisions. As a result, the sanction indicator consists of a maximum of 22 points.

**Table 1: Elements of the sanction indicator**

1.	Termination or a reduction of 100% after a first fault for a minimum period of two years or more
2.	Termination or a reduction of 100% after a first fault for a minimum period of one year or more.
3.	Termination or a reduction of 100% after a first fault for a minimum period of three months or more.
4.	Termination or a reduction of 100% after a first fault for a minimum period of two months or more
5.	Termination or a reduction of 100% after a first fault for a fixed period.
6.	Termination or a reduction of 100% after a first, second or third fault for a fixed period of six months or more.
7.	Termination or a reduction of 100% after a first, second or third fault for a minimum period of twelve months or more.
8.	Termination or a reduction of 100% after a first or second fault for a

<sup>20</sup> See Act on Active Social Policy, par. 36-38.

<sup>21</sup> See Act on Active Social Policy, par. 40.

<sup>22</sup> See Act on Active Social Policy, par. 41.



minimum period of six months or more

9. Termination or a reduction of 100% after a first, second or third fault for a minimum period of three months or more
10. Termination or a reduction of 100% after a first or second fault with and without a fixed period.
11. Termination or a reduction of 100% after a first, second or third fault, for a fixed period.
12. Termination or a reduction of 100% after a first, second or third fault with and/or without a fixed time period (i.e. immediate reparation of the fault is possible) and excluding those countries who have adopted a discretionary provision regarding the percentage of the sanction (i.e. up to 100%).
13. Termination or a reduction of 100% after a first, second or third fault, with and/or without a fixed time period (i.e. immediate reparation of the fault is possible) and including those countries who have adopted a discretionary provision regarding the percentage of the sanction (i.e. up to 100%).
14. Termination or a reduction of 100% after a first fault, with and/or without a fixed time period (i.e. immediate reparation of the fault is possible) and including those countries who have adopted a discretionary provision with regard to the percentage of the sanction (i.e. up to 100%).
15. Termination or a reduction of 80% or more for after a first fault.
16. Termination or a reduction of 50% or more after a second fault, excluding those countries who have adopted a discretionary provision regarding the percentage of the sanction (i.e. up to 100%).
17. Termination or a reduction of 50% or more after a first fault, excluding those countries who have adopted a discretionary provision regarding the percentage of the sanction (i.e. up to 100%).
18. Termination or a reduction of 20% or more after a first fault, including those countries who have adopted a discretionary provision regarding the percentage of the sanction (i.e. up to 100%).
19. Termination or a reduction of 50% or more after a first, second or third fault, including those countries who have adopted a discretionary provision regarding the percentage of the sanction (i.e. up to 100%).
20. Termination or a reduction of any kind excluding those countries who have legislated that benefits may only be reduced on the condition that if it will not endanger a living essential in providing security needed for a life of human dignity.

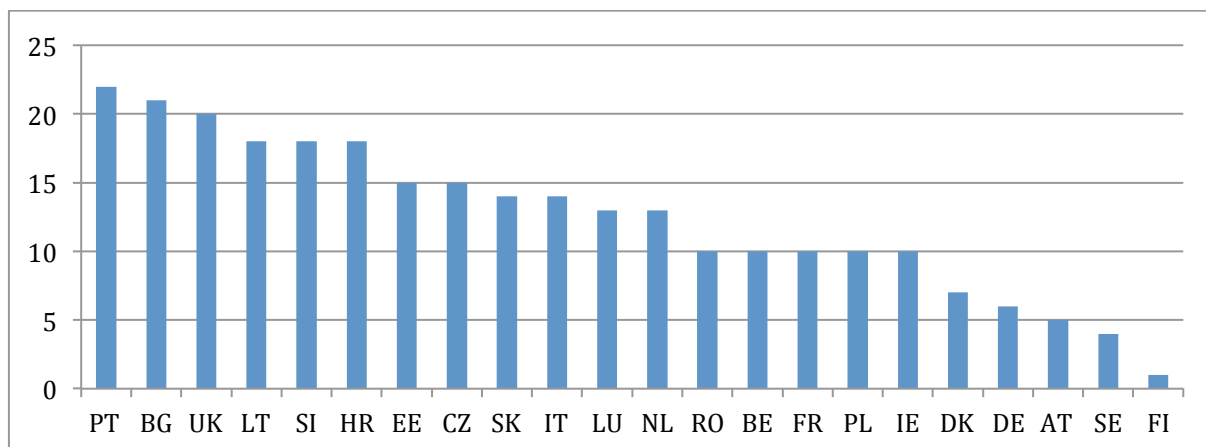
**Table 2: The scores on the sanction indicator**

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	Total
<b>A T</b>													x			x		x	x	x	5
<b>B E</b>									x	x	x	x	x	x		x		x	x	x	10
<b>B G</b>		x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	21
<b>C Z</b>			x	x	x				x	x	x	x	x	x	x	x	x	x	x	x	15
<b>D E</b>												x	x			x		x	x	x	6
<b>D K</b>										x		x	x			x	<sup>23</sup>	x	x	x	7
<b>E E</b>			x	x	x				x	x	x	x	x	x	x	x	x	x	x	x	15
<b>F I</b>																		x			1
<b>F R</b>										x	x	x	x		x	x	x	x	x	x	10
<b>H R</b>			x	x	x	x		x	x	x	x	x	x	x	x	x	x	x	x	x	18
<b>I E</b>									x	x	x	x	x			x	x	x	x	x	10
<b>I T</b>				x	x				x	x	x	x	x	x	x	x	x	x	x	x	14
<b>L T</b>			x	x	x	x		x	x	x	x	x	x	x	x	x	x	x	x	x	18
<b>L U</b>						x	x		x	x	x	x	x		x	x			x	x	13
<b>N L</b>					x				x	x	x	x	x	x	x	x	x	x	x	x	13
<b>P L</b>										x		x	x	x	x	x	x	x	x	x	10
<b>P T</b>	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	22
<b>R O</b>										x		x	x	x	x	x	x	x	x	x	10
<b>S E</b>													x	x				x	x		4
<b>S I</b>			x	x	x	x		x	x	x	x	x	x	x	x	x	x	x	x	x	18
<b>S K</b>				x	x			<sup>24</sup>	x	<sup>25</sup>	x	x	x	x	x	x	x	x	x	x	14
<b>U K</b>			x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	20

<sup>23</sup> Assuming that recipients are not absent 50% or more.

<sup>24</sup> After a second fault: 50% reduction for 10 months, this is calculated as 100% reduction of 5 months.

<sup>25</sup> Ibid.



**Figure 1: Sanction Indicator**

Table 2 contains the score for each indicator of each member state. These scores are visualized in Figure 1. This figure shows that a number of countries share the same scores. As I intended to compare these scores with indicators related to characteristics of systems of social protection using the Spearman correlation (which compares the rankings of countries) it was necessary to further differentiate between countries with similar scores. For this purpose, I first examined the legislation of mitigation provisions. These are provisions ‘softening’ the sanction. I distinguished between three types of mitigation provisions: hardship clauses (that allow some benefits, eventually in kind, despite the imposition of a financial sanction) reparatory conditions (that allows for withdrawal of the financial sanction as soon as the sanctioned recipient complies with the work-related obligations) and good reason conditions (allowing the decision-maker not to impose the sanction in case of good reasons). As shown in Table 3, countries with similar scores had also legislated the same number of mitigation provisions in two cases. In these cases, I examined whether the legislation excluded specific components of the social assistance benefits from sanctioning. In the case of Belgium and France (both scoring 10 on the sanction index and legislating two types of mitigation provisions) Belgium received a higher ranking on the sanction indicator (revealing a harsher sanctioning system) compared to France because in France benefits are sanctioned for 50% (instead of 100%) where the household consists of more than one person. In addition, Poland was ranked higher compared to Ireland (both scoring 10 on the sanction index and legislating all three types of mitigation provisions) because in the Irish system a reduction of benefits does not affect the rent

and heating component. Table 4 shows the ranking on the sanction indicator based on this additional analysis.

**Table 3: Differentiating the scores**

<b>Score 18</b> (number of mitigation provisions)	<b>Score 15</b> (number of mitigation provisions)	<b>Score 13</b> (number of mitigation provisions)	<b>Score 10</b> (number of mitigation provisions)
Croatia (0)	Estonia (1)	Luxembourg (2)	Romania (1)
Slovenia (1)	Czech Republic (2)	Netherlands (3)	Belgium (2)
Lithuania (2)			France (2)
			Poland (3)
			Ireland (3)

**Table 4: Rank on the Sanction Indicator**

<b>Member State</b>	<b>Rank on the sanction indicator</b>
Portugal	1
Bulgaria	2
United Kingdom	3
Croatia	4
Slovenia	5
Lithuania	6
Estonia	7
Czech Republic	8
Slovakia	9
Italia	10
Luxembourg	11
Netherlands	12
Romania	13
Belgium	14
France	15
Poland	16
Ireland	17
Denmark	18
Germany	19
Austria	20
Sweden	21
Finland	22

## 5. Explaining the adoption of work-related sanctions

For the European Union, work-related sanctions amount to incentives to participate in the labour market. However, there are many different instruments that can be used to activate beneficiaries of social assistance towards paid employment. Before I continue analysing the relationship between the height of work-related sanctions and the characteristics of the social protection systems, this section, first, examines some reasons explaining the preference for work-related sanctions (also called ‘the stick’) over enabling instruments (also called ‘the carrot’).

Why do governments prefer the legislation of work-related sanctions over investments in enabling instruments, such as training programmes? It could be hypothesized that governmental coalitions characterized with a left-wing social-economic orientation are more inclined to adopt relatively low work-related sanctions compared to governmental coalitions characterized with a right-wing social-economic orientation. In order to investigate this hypothesis, I examined the political colour of the national governments two years preceding the date of the analysed sanctioning legislation (2013). Figure 3 shows whether the economic and social policies of each national government could be depicted as left-wing, neutral or right-wing. The colour red indicates a predominantly left-wing social economic orientation of the governmental coalition; green indicates a middle position regarding the social economic orientation of the government; blue indicates a right-wing social economic orientation of the government; grey indicates that no information was available in this regard. The dispersion of the colours among member states suggests that there is no relationship between governmental coalitions and the social-political orientation of the governmental coalitions.<sup>26</sup> This means that our hypothesis should be rejected. Moreover, in contrast to our expectations, the only trend we could specify is that the countries who scored high on the sanction indicator lists had a governmental coalition with a left-wing social-economic orientation.

Possibly the adoption of work-related sanctions as an activation instrument is preferred over other instruments because it is less expensive. Hence, it could be hypothesized that member states with a low Gross Domestic Product (GDP) are more inclined to adopt work-related sanctions compared to member states with a high GDP. Indeed, table 5 reveals a low-moderate

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<sup>26</sup> The following database was used for this study: C. Cruz, P. Keefer and C. Cartascini, Political institutions of the Inter-American Development Bank (<https://publications.iadb.org/handle/11319/7408>, accessed on 30 January 2018).

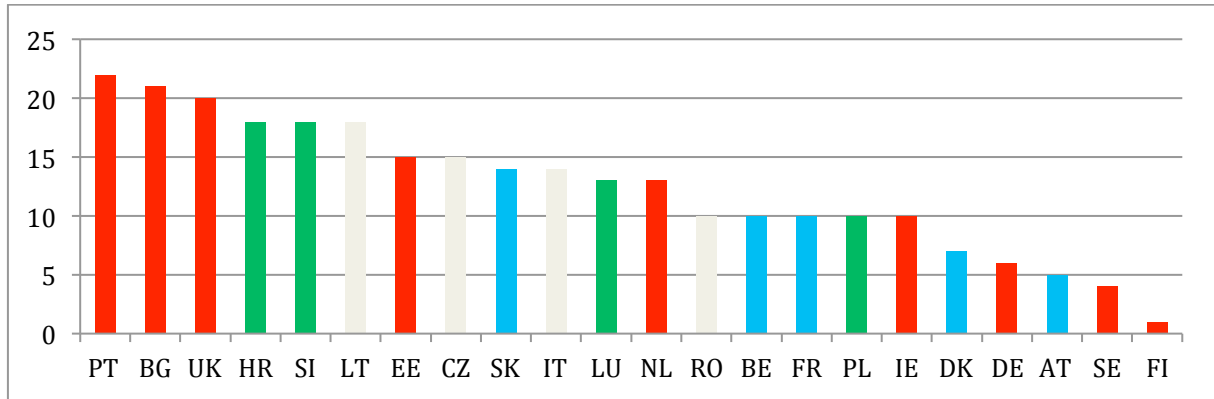
negative Spearman correlation between the ranking on the sanction indicator and the GDP (-0,482).

However, a correlation between the GDP and the sanction indicator does not necessarily imply a causal relationship. The differences between sanctioning policies could also be explained by other factors which are also related to the GDP, such as the type of welfare state. Indeed, the sanction indicator also suggests a relationship between the height of the sanction and the welfare state type. For example, Table 4 shows that member states belonging to the post-Communist welfare state type, the former USSR type, and the Mediterranean type score relatively high on the sanction indicator (Portugal, Bulgaria, Croatia, Slovenia, and Lithuania) while member states belonging to the conservative and social-democratic welfare state type rank relatively low (Denmark Germany Austria, Sweden, and Finland). In addition, member states belonging to the Anglo-Saxon welfare state type both score relatively high (the UK) and medium (Ireland). A possible relationship between the ranking on the sanction indicator and the welfare state type seems to be limited, however, to the welfare states ranked at the top and at the bottom of sanction indicator. Member states located in the middle range, then, belong to all six distinguished types of welfare states, except for the social democratic welfare state type (Estonia, the Czech Republic, Slovakia, Italy, the Netherlands, Romania, Belgium, France, and Poland).<sup>27</sup>

More (qualitative) research needs to be done to establish why member states choose for high work-related sanctions. Yet, as mentioned above, the aim of this chapter is not so much to explain the differences in sanctioning policies but to compare the characteristics of the social policies and social protection systems of the member states that have legislated relatively high work-related sanctions with those with relatively low work-related sanctions. This issue will be the topic of the next two sections.

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<sup>27</sup> For the classification of welfare state types I draw on G. Bonoli, "Classifying welfare states", *Journal of European Social Policy* Vol. 26, 1997, pp. 351-372; F.G. Castles and H. Obinger, "Worlds, families, regimes", *West European Politics* Vol. 31, 2008, pp. 321-344; G. Esping-Andersen, *The Three Worlds of Welfare Capitalism*, Cambridge, Polity, 1999; H.J.M. Fenger, "Welfare regimes in Central and Eastern Europe: Incorporating post-communist countries in a welfare regime typology", *Contemporary issues and ideas in Social Sciences* Vol. 3, 2007, pp. 1-30; E. Ferragina and M. Seeleib-Kaiser, "Welfare regime debate: past, present, futures?", *Policy & Politics* 39 (4), pp. 583-611.



**Figure 2: Sanction Indicator and political colour**

## 6. The sanction indicator compared to characteristics of national social policies

From a social rights perspective, we are particularly interested in possible violations of access to basic social rights as a result of the sanctioning system. Tables 1 and 2 shows that all national social assistance legislations, except Finland, have legislated a sanction of 100% reduction or termination.<sup>28</sup> This means that in almost all examined member states the income of recipients of social assistance may fall below the poverty line when the welfare recipients do not comply with work-related obligations.<sup>29</sup> This risk increases in those (eleven) member states where the benefits are normally reduced during a fixed period of at least *one month* after a *first fault*;<sup>30</sup> and even more so in seven member states where the access to benefits are denied for *six months or more*.<sup>31</sup> Particular welfare recipients living in the latter member states seem to be at risk of falling below the poverty line. Depending on the generosity of the national system of social protection, this risk could be (partly) mitigated. This section explores the characteristics of national social policies of member states that have adopted (these) high work-related sanctions compared with those adopting relatively

<sup>28</sup> See element 13 of the sanction indicator.

<sup>29</sup> It should be noted though that both Finland and Sweden have stipulated that benefits may only be reduced on the condition that it will not endanger a living providing a security for living a life in dignity (see element 20 of the sanction indicator).

<sup>30</sup> See element 5 of the sanction indicator.

<sup>31</sup> See element 6 of the sanction indicator.

low work-related sanctions. To this end, this section analyses the relationship between the sanction indicator and the (1) governmental expenditures devoted to social protection as a ratio to the GDP; (2) reduction in the percentage of the risk of poverty rate due to social transfers (excluding pensions) and (3) public expenditure on Active Labour Market Policies (ALMP) as a percentage of the GDP.

Table 5 shows a low-moderate negative Spearman correlation between the total expenditure of government devoted to social protection as a ratio to GDP (-0,487). This means that countries adopting relatively high work-related sanctions tend to spend a smaller percentage of the GDP on social protection. It should be noted that expenditures to ‘social protection’ is not confined to expenditure on social assistance benefits of last resort; it also covers old age and sickness/healthcare benefits, benefits related to family/children, disability, survivors, and unemployment. Moreover, in 2014 across the EU old age and sickness/healthcare benefits together accounted for 66,9 % of total social protection expenditure.<sup>32</sup>

Yet, from a social rights perspective, we are particularly interested in the expenditures of member states (relative to their GDP) on *minimum income* benefits. In addition, since we focus on the legislation of *work-related* sanctions we are interested in minimum income benefits for people *below the pensionable age*. In this respect, the EU data on the reduction in the percentage of the risk of poverty rate due to social transfers seem to be more suitable, as these data are not only directly related to the access to minimum income benefits, but also excludes expenditures on pensions. Table 5 shows a moderate negative Spearman correlation with the height of the sanction indicator (-0,530). This means that in member states with relatively high work-related sanctions the poorest part of the population tends to benefit less from social transfers, compared to member states with low work-related sanctions (see Figure 3). Figure 3 shows that Germany, Poland and Romania are outliers. These countries score relatively low on the sanction indicator compared to what would be expected regarding the reduction of the risk of poverty due to social transfers in these countries. If we exclude them from the analysis, the Spearman correlation rises to -0,733.

Finally and unsurprisingly, table 5 shows a high Spearman correlation between the sanction indicator and the public expenditure on Active Labour Market Policies (ALMP) such as training, employment incentives, sheltered and supported employment and rehabilitation as a percentage of GDP.<sup>33</sup> The

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<sup>32</sup> Eurostat, Statistics Explained. Social protection statistics, June 2017 ([http://ec.europa.eu/eurostat/statistics-explained/index.php/Social\\_protection\\_statistics](http://ec.europa.eu/eurostat/statistics-explained/index.php/Social_protection_statistics), accessed at 24 Februari 2018).

<sup>33</sup> These active measures are distinguished from ‘passive’ measures such as unemployment benefits. It should be noted that no data were available for Bulgaria, Croatia, Romania and the UK



enabling and motivating instruments seem to function as communicating vessels: member states spending relatively more on active labour market policies tend to impose lower work-related sanctions (see Figure 4). In sum, member states that have adopted high work-related sanctions tend to spend less money on social protection, in particular, regarding benefits and provisions that reduce the risk of poverty rate. In addition, the investments of these member states in enabling policies are considerably lower compared to member states with low work-related sanctions.

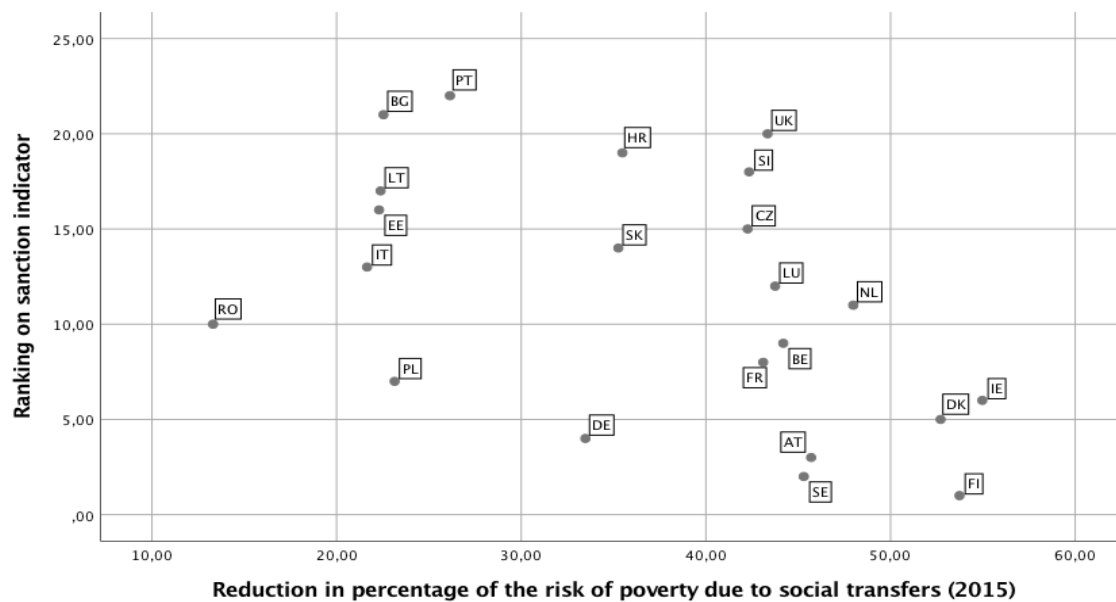
**Table 5 Spearman correlation social and employment policies**

	GDP (2015)	Total expenditure of government devoted to social protection as a ratio to GDP (2015)	Reduction in the percentage of the risk of poverty rate, due to social transfers <sup>34</sup> (2015) (excluding DE, PL, RO)	Public Expenditure on Active Labour Market Policies <sup>35</sup> (2015)
Spearman's correlation	-0,482	-0.487	-0,530 (-0,733)	-0.753
Significant at (two tailed)	0,023	0.021	0.011 (0,000)	0.000
Number of observations	22	22	22 (19)	18

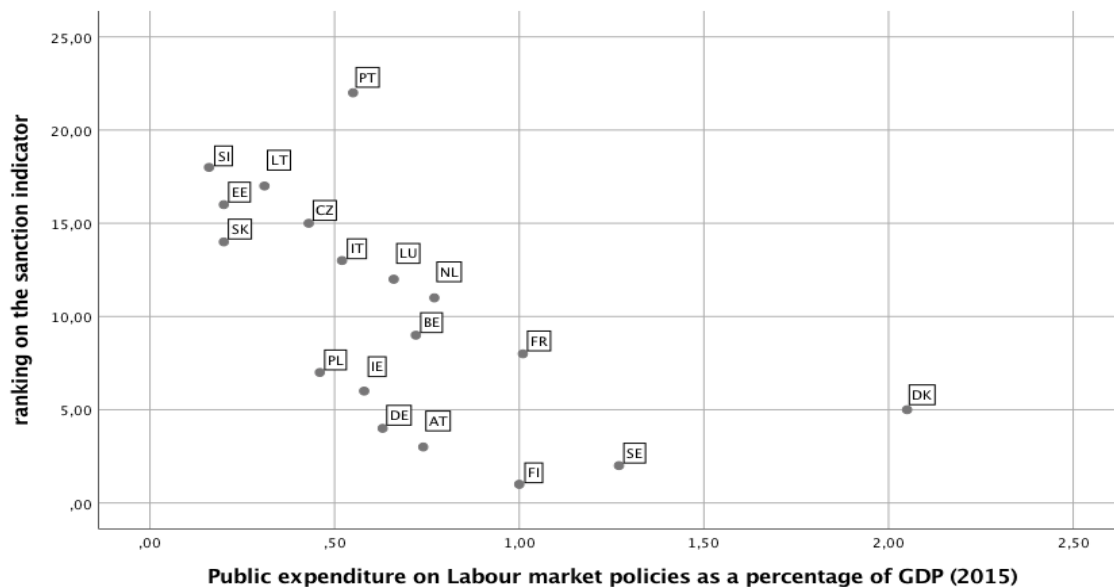
Sources: Eurostat data (2015) and OECD (2015).

<sup>34</sup> Pensions are excluded.

<sup>35</sup> The data are restricted to active measures. There was no data available for Bulgaria, Croatia, Romania and the UK.



**Figure 3: Ranking on the sanction indicator is higher in member states that spend less on benefits and provisions reducing the risk of poverty.**



**Figure 4: Ranking on the sanction indicator is higher in member states that spend less on Labour Market Policies.**

## 7. The adequacy of social assistance benefits

From a social rights perspective, we are also interested in the question whether benefits of last resort are sufficient regardless of the imposition of a work-related sanction. Art. 34 (3) of the EU Charter of Fundamental Rights (ECFR) stipulates that

“in order to combat social exclusion and poverty, the Union recognizes and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national law and practices”.

Art. 13 (1) of the European Social Charter (ESC) which lays down the right to social and medical assistance for anyone without adequate resources, has

been an important source for Art. 34 (3) of the ECFR.<sup>36</sup> Moreover in the European context the ESC has been found the key legal instrument regulating social rights.<sup>37</sup> This section considers, first, the extent to which, according to the supervising body of the ESC, the European Committee of Social Rights (ECSR), EU member states comply with the duties following from Art. 13 (1) ESC. Consequently, it analyses the relationship between the height of the work-related sanction and the extent to which member states - according to the ECSR - comply with the duty to guarantee access to a minimum income in accordance with Art. 13 (1) ESC.<sup>38</sup>

With respect to Art. 13 ESC, the ECSR asks member states regularly to provide information regarding their system of social assistance benefits, including the amount of the benefits granted to beneficiaries of social assistance. Based on this information, the ECSR reports whether it is sufficient, i.e. that it amounts to at least 50% of the median equivalized income. The last Conclusions of the ECSR on Art.13 ESC date from 8 December 2017; 4 December 2015 and 6 December 2013. I examined the Conclusions in these years for all member states listed at the sanction indicator, except for Slovenia that neither signed nor ratified the ESC. In addition, during this period the ECSR did not report for Poland on Art. 13 ESC.

The main results are listed in Table 6. This table shows that only a minority of the ratifying states comply with the criterion set by the ECSR. If we look at the most recent report for each country then only six out of twenty countries meet this standard, namely: Belgium; Romania; and the UK (Conclusions December 2017); Luxembourg; the Netherlands; and Sweden (Conclusions 2013). With respect to two additional countries the ECSR stated that the amount of the benefits was not adequate for all groups (e.g.

<sup>36</sup> See the explanations relating to the Charter of Fundamental Rights (OJ 2007/C 303/27).

<sup>37</sup> M. Mikkola, *Social Human Rights of Europe*. Karelactio Legisactio Ltd, Porvoo, 2010.

<sup>38</sup> Note that the right to a basic means of subsistence has been enshrined in a number of International Treaties. In addition to art. 34 (3) ECFR and Art. 13 ESC, the most important provisions are Art. 25 (1) of the Universal Declaration of Human Rights, according to which “everyone has the right to a standard of living adequate for the health and well-being of himself and of his family”; Art. 27 (1) of the Convention on the Rights of the Child, which states that “States Parties recognize the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development”; Art. 9 and Art. 11 (1) and (2) of the International Covenant on Economic, Social and Cultural Rights (ICESR). Art. 9 ICESCR stipulates the right to social security. Point 16 of the General Comment to Art. 9 further states that at the expiry of the period of unemployment benefits, the social security system should ensure adequate protection, for example through a system of social assistance (General Comment No. 19, adopted 23 November 2007 at the 39<sup>th</sup> session [doc.no. E/C.12.GC/19]). In case of unemployment, Art. 11(1) ICESCR recognizes “the right of everyone to an adequate standard of living for himself and his family, including adequate food clothing and housing and to the continuous improvement of living conditions”.

immigrants, youth, pensioners, etc.) i.e. Austria and Finland (Conclusions 2017). With respect to the other twelve countries the ECSR stated in their most recent Conclusions that the amount of benefit was inadequate. In the 2013 and 2015 reports, the ECSR also used the word ‘manifestly inadequate’ for a few countries, namely: Croatia, Lithuania, Portugal, Romania (however, in 2017, the ECSR reported that the social benefits in Romania were ‘adequate’) and Slovakia. It is remarkable that none of the first group of countries (qualified ‘adequate’, or ‘almost adequate’), with the exception of the UK, are ranked in the top ten of the sanction indicator. Conversely, all countries of the second group (qualified ‘manifestly inadequate’) belong to the top ten.<sup>39</sup> In other words - and confirming the results of previous section - countries that legislate higher work-related sanctions are more likely to violate Art. 13(1) ESC regarding the amount of social benefit offered to its citizens.

In order to establish a quantifiable relationship between the ranking on the sanction indicator and the compliance with art. 13 (1) ESC, I have quantified the qualitative results by rating the Conclusions of the ECSR between 2013 and 2017, according to the qualification such as ‘adequate’ or ‘manifestly inadequate’, using rates between 1 and 5 points (see Table 7).<sup>40</sup> Based on these ratings I calculated the Spearman correlation between the two variables. Table 8 shows a low-moderate Spearman correlation (0,489) between the ECSR Conclusion rating of the 19 remaining member states<sup>41</sup> and their listing on the sanction indicator. The UK, ranking third on the sanction indicator list, and which benefits were qualified ‘adequate’ is clearly an outlier. When we leave out the UK, we find a high-moderate Spearman correlation (0,661).

The ECSR also considers reductions, suspensions, or terminations of the entitlement to social assistance due to a (work-related) sanction. The Conclusions suggest that, unless the state has adopted appropriate hardship clauses, work-related sanctions may contravene the right to minimum means of subsistence. In previous research, I have shown the adoption of hardship clauses is related to the ranking on the sanction indicator: countries ranked high on the sanction indicator tend to be less inclined to adopt hardship clauses compared to lower ranked countries.<sup>42</sup>

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<sup>39</sup> Romania is put in the first group, because of the report of 2017.

<sup>40</sup> Czech Republic could not be rated, because the ECSR concluded in 2013 that it lacked information for a Conclusion on 13 ESC and in the years thereafter the ECSR did not examine this country.

<sup>41</sup> In addition to Slovenia (did not ratify the ESC) and Poland (the ECSR did not report on art. 13 (1) between 2013 and 2017), I had to leave out the Czech Republic, as this member state did not provide enough information to the ECSR (see Table 6). As a result 19 member states were left out for the analysis.

<sup>42</sup> See note 4.

In sum, the conclusions of the ECSR are an important source for the assessment of the adequacy of social assistance systems. The analysis in this section has shown a relationship between countries ranking high on the sanction indicator lists and the adequacy of the social benefits according to the Conclusions of the ESCR. This means that the social benefits in these countries are more often judged as ‘not adequate’ compared to countries that have adopted relatively low benefits. The picture is worsened due to the fact that countries ranking higher on the sanction indicator tend to be less inclined to stipulate hardship clauses. It should be noticed, however, that only a minority of the examined member states meets the threshold set by the ECSR. This implies that regardless of the sanctioning policies, recipients of social assistance in most member states do not have access to basic social rights.

**Table 6 Adequacy of benefits (Conclusions art 13 ESC, ECSR)<sup>43</sup>**

	2013	2015	2017	Rating
AT	Level of basic benefits falls between 40% and 50% of the Eurostat median equivalised income. More information is needed regarding additional benefits.		The overall assistance may in some cases reach and even exceed 50% of the median equivalised income. However not adequate for all persons.	3
BE	Inadequate for certain groups.		Adequate. <sup>44</sup>	2
BG	Manifestly inadequate.		Not adequate.	5
CZ	Not enough information. <sup>45</sup>			
DE	Not enough information.		Not adequate.	4
DK		Not adequate for certain groups.	Not adequate for certain groups. <sup>46</sup>	3
EE	Not adequate.		Not adequate.	4
FI	Not adequate for all groups. <sup>47</sup>		Not adequate for all groups.	3
FR		Not adequate.	Not adequate.	4
HR	Manifestly inadequate. <sup>48</sup>			5
IE	Adequate.		Not adequate.	3
IT	Not adequate.		Not adequate.	4
LT	Manifestly inadequate.		Not Adequate.	5
LU	Adequate.			1
NL	Adequate			1
PT	Manifestly inadequate		Not adequate.	5
RO		Manifestly inadequate.	Adequate.	3
SE	Adequate.			1
SK	Manifestly inadequate.		Not adequate.	5
UK	Adequate.		Adequate.	1

<sup>43</sup> Appendix I contains the references to the Conclusions of the ECSR for each of these countries.

<sup>44</sup> The guaranteed income for the elderly is not granted to foreigners without resources unless they are covered by EU law or are nationals of States which have concluded reciprocity agreements with Belgium.

<sup>45</sup> Also, in 2010 the ECSR concluded that information was missing.

<sup>46</sup> The levels of social assistance paid to persons under 30 years of age and of integration allowance paid to single newly arrived foreigners and for Danish citizens who have not lived in Denmark for at least seven of the past eight years.

<sup>47</sup> The granting of social assistance benefits to foreign nationals from certain States Parties, legally residing in Finland, is subject to an excessive length of residence condition.

<sup>48</sup> Also, in 2010 the ECSR concluded that the benefits in Croatia were manifestly inadequate. See: <http://hudoc.esc.coe.int/eng/?i=XIX-2/def/HRV/13/1/EN>.

**Table 7: Rating of the Conclusions of the ECSR**

Manifestly inadequate/inadequate	5
Not adequate	4
Not adequate for all or certain groups	3
(manifestly) inadequate/adequate	3
Adequate/inadequate for certain groups	2
Adequate	1

**Table 8: Spearman Correlation Conclusions ECSR (Art. 13 ESC) and the ranking on the sanction indicator**

	Judgment of the level of social assistance benefits ECSR (Art. 13 ESC) (excluding UK)
Spearman's correlation	0.489 (0,661)
Significant at (two tailed)	0.033 (0,03)
Number of observations	19 <sup>49</sup> (18)

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<sup>49</sup> Three member states are missing, because (1) Slovenia did not ratify the ESC; (2) the ECSR did not report for Poland with respect to Art. 13 ESC in the period 2015-2017; (3) the Czech Republic did not provide sufficient information.



## 7. Conclusion

The European Commission considers work-related sanctions exclusively as an incentive to work. In this article I have analysed work-related sanctions from a social rights perspective. As such, I have examined the legislation of work-related sanctions in the context of the broader system of social protection and the fundamental right to social assistance. This opened up the possibility of analysing financial sanctions beyond their instrumental function (i.e. ‘an incentive to work’).

In general, the analysis confirms the hypothesis posed in the introduction. It has shown that member states that have legislated relatively high work-related sanctions tend to spend less money on social protection, in particular, regarding benefits and provisions that reduce the risk of poverty rate. In addition, the investments of these member states in enabling policies (i.e. ALMP) are considerable lower compared to member states that have legislated relatively low work-related sanctions. Also, the access to the threshold of 50% of the median equivalised income is less well secured in member states that have adopted high work-related sanctions, compared to member states that have adopted low work-related sanctions.

Based on the latter analyses the question could be raised whether work-related sanctions really operate as an incentive to work in member states that have adopted relative high work-related sanctions. For example, it could be argued that the overall low level of social benefits already functions as an incentive to look for paid work. Indeed, regarding the level of benefits, it can be assumed that only people who are unable to find a paid job or secure their livelihood in another way will apply for social benefits. In addition, regarding the fact that these countries have adopted less enabling measures (ALMP) compared to member states that have legislated relatively low work-related sanctions, these sanctions are probably less often coupled to a duty to participate in training or work experience programme. Regarding these results, it could be assumed that in low sanctioning member states the financial sanction more often operates as an incentive to improve individual capabilities to (re-)integrate in the labour market compared to high sanctioning member states.

It should be noted, though, that recipients of social assistance living in member states that have legislated rather low financial sanctions are also at risk of falling below the poverty line, as almost all member states (i.e. including low sanctioning member states) have legislated a 100% reduction or termination of the benefits in case of a work-related fault. Moreover, since the level of benefits are general higher in these countries (and as a result, more money is at stake) recipients of social assistance may feel more dependent on the welfare state manager and workfare supervisors. As a

result, these welfare recipients may become even more vulnerable to exercises of arbitrary power and/or violations of dignity when compared to welfare recipients living in member states that have legislated relatively high work-related sanctions.

At the same time, the Conclusions of the ECSR on the implementation of Art. 13 ESC (which has been the inspiration of Art. 34 ECFR) are quite alarming for most member states, particularly those member states that have legislated relatively high work-related sanctions. These Conclusions should, in my opinion, be an important reason for the European Commission to develop a genuine social rights perspective on Art. 14 of the European Pillar of Social Rights which seriously examines the amount of social assistance benefits in member states and which considers the extent to which work-related sanctions affect the access to a minimum income.

Appendix 1  
Sources Conclusions ECSR (Art. 13 (1) ESC)

Austria

2013: <http://hudoc.esc.coe.int/eng/?i=2013/def/AUT/13/1/EN>

2017: <http://hudoc.esc.coe.int/eng/?i=2017/def/AUT/13/1/EN>.

Belgium

2013: <http://hudoc.esc.coe.int/eng/?i=2013/def/BEL/13/1/EN>.

2017: <http://hudoc.esc.coe.int/eng/?i=2017/def/BEL/13/1/EN>.

Bulgaria

2013: <http://hudoc.esc.coe.int/eng/?i=2013/def/BGR/13/1/EN>

2017: <http://hudoc.esc.coe.int/eng/?i=2017/def/BGR/13/1/EN>

Czech Republic

2013: <http://hudoc.esc.coe.int/eng/?i=XX-2/def/CZE/13/1/EN>

Germany

2013: <http://hudoc.esc.coe.int/eng/?i=XX-2/def/DEU/13/1/EN>

2017: <http://hudoc.esc.coe.int/eng/?i=XXI-2/def/DEU/13/1/EN>

Denmark

2015: <http://hudoc.esc.coe.int/eng/?i=XX-2/def/DNK/13/1/EN>

2017: <http://hudoc.esc.coe.int/eng/?i=XXI-2/def/DNK/13/1/EN>

Estonia

2013: <http://hudoc.esc.coe.int/eng/?i=2013/def/EST/13/1/EN>

2017: <http://hudoc.esc.coe.int/eng/?i=2017/def/EST/13/1/EN>

Finland

2013: <http://hudoc.esc.coe.int/eng/?i=2013/def/FIN/13/1/EN>

2017: <http://hudoc.esc.coe.int/eng/?i=2017/def/FIN/13/1/EN>

France

2015: <http://hudoc.esc.coe.int/eng/?i=2015/def/FRA/13/1/EN>

2017: <http://hudoc.esc.coe.int/eng/?i=2017/def/FRA/13/1/EN>

Croatia

2013: <http://hudoc.esc.coe.int/eng/?i=XX-2/def/HRV/13/1/FR>

Ireland

2013: <http://hudoc.esc.coe.int/eng/?i=2013/def/IRL/13/1/EN>

2017: <http://hudoc.esc.coe.int/eng/?i=2017/def/IRL/13/1/EN>

Italy

2013: <http://hudoc.esc.coe.int/eng/?i=2015/def/ITA/13/1/FR>

2017: <http://hudoc.esc.coe.int/eng/?i=2017/def/ITA/13/1/EN>

Lithuania

2013: <http://hudoc.esc.coe.int/eng/?i=2013/def/LTU/13/1/FR>

2017: <http://hudoc.esc.coe.int/eng/?i=2017/def/LTU/13/1/EN>

Luxembourg

2013: <http://hudoc.esc.coe.int/eng/?i=XX-2/def/LUX/13/1/EN>

Netherlands

2013: <http://hudoc.esc.coe.int/eng/?i=2013/def/NLD/13/1/EN>

Portugal

2013: <http://hudoc.esc.coe.int/eng/?i=2013/def/PRT/13/1/FR>

2017: <http://hudoc.esc.coe.int/eng/?i=2017/def/PRT/13/1/EN>

Romania

2015: <http://hudoc.esc.coe.int/eng/?i=2015/def/ROU/13/1/EN>

2017: <http://hudoc.esc.coe.int/eng/?i=2017/def/ROU/13/1/ENI>

Sweden

2013: <http://hudoc.esc.coe.int/eng/?i=2013/def/SWE/13/1/EN>

Slovakia

2013: <http://hudoc.esc.coe.int/eng/?i=2013/def/SVK/13/1/FR>

2017: <http://hudoc.esc.coe.int/eng/?i=2017/def/SVK/13/1/EN>

UK

2013: <http://hudoc.esc.coe.int/eng/?i=XX-2/def/GBR/13/1/EN>

2017: <http://hudoc.esc.coe.int/eng/?i=XXI-2/def/GBR/13/1/EN>

## Appendix 2

### Legislation that has been considered for this study

Country	Name Legislation (date and source) <i>English translation</i> (date and source)
Austria	Vereinbarung zwischen dem Bund und den Ländern gemäß Art. 15a B-VG über eine bundesweite Bedarfsorientierte Mindestsicherung (Beschluss, 1-12-2010, STF: LGBI Nr 27/2011). <i>Agreement between the Federal and State Governments about a nationwide demand-oriented minimum benefit</i> (Decision of 1 December 2010. STF: LGBI Nr 27/2011). Wiener Mindestsicherungsgesetz (Gesetz, 31-8-2010, S 040-000). <i>Vienna Act on Minimum Benefits (Law of 31 August 2010, S 040-000).</i>
Belgium	Wet van 26 mei 2002 betreffende het recht op maatschappelijke integratie (26 mei 2002, nr. 2002022557, p. 33610). <i>Act concerning the right to social integration (Law of 26 May 2002, no. 2002022557, p. 33610).</i>
Bulgaria	Закон за социално подпомагане (Отразена деноминацията от 05.07.1999 г.) <i>Social Assistance Act (7 May 1999).</i> Правилник за прилагане на закона за социално подпомагане (Приет с ПМС № 243 от 05.11.1998 г.). <i>Regulation on the application of the Social Assistance Act (Decree No. 243 of 5 November 1998).</i>
Croatia	Zajamčena minimalna naknada (24-12-2014, 157/2013). <i>Social Welfare Act (Law of 24 December 2014, Official Gazette 157/2013).</i>
Czech Republic	o životním a existenčním minimu (14-03-2006, 110/2006). <i>Minimum Income Support (Act of 14 March 2006, Act no. 110/2006).</i>
Denmark	Lov om aktiv socialpolitik, lovbekendtgørelse nr. 1193, (Statutory act on active social policy, Consolidation Act no. 1193, of 13 November 2014). Lov om aktiv beskæftigelsesindsats (lovbekendtgørelse nr. 990, 12-9-2014). <i>Statutory act on active employment policy (Consolidation Act no. 990, of 12 September 2014).</i>
Estonia	Sotsiaalhoolekande seadus (RT I 1995, 21, 323, 1-4-1995). <i>Social Welfare Act (RT I 1995, 21, 323, Act of 01.04.1995).</i>
Finland	Asiakaslaki (Laki sosiaalihuollon asiakkaan asemasta ja oikeuksista (30.12.97/1412, Act of 30 December 1997). ( <i>Social Assistance Act (Act of 30.12.1997/1412).</i> Laki sosiaalihuollon asiakkaan asemasta ja oikeuksista (22.09.2000/812). <i>Act on the Status and Rights of Social Welfare Clients (22.09.2000/812, Act of 22 September 2000).</i>
France	Revenu de Solidarité Active (LOI n° 2008-1249 du 1er décembre 2008 généralisant le revenu de solidarité active et réformant les politiques d'insertion. <i>Solidarity Income (Act no. 2008-1249 of 03.12.2008).</i>
Germany	Grundsicherung (SGB II) (BGBI. I S. 2954, Gesetz vom 24.12.2003). ( <i>Basic insurance, BGB I S. 2954, Law of 24 December 2003).</i>
Ireland	Consolidated Social Welfare Consolidation Act 2005 (Number 26 of 2005, Irish Statute Book).
Italy	Decreto Legislativo Disposizioni per il riordino della normativa in materia di ammortizzatori sociali in caso di disoccupazione involontaria e di ricollocazione dei lavoratori disoccupati, in attuazione della legge 10 dicembre 2014, n. 183. (04.03.2015 n. 22/2015). <i>Legislative Decree Recordering of legislation regarding unemployment benefits in the event of involuntary unemployed people reintegration, pursuant to Law 10 December 2014, no. 183 ( 04.03.2015 no. 22/2015).</i>
Lithuania	Lietuvos Respublikos Piniginės socialinės paramos nepasiturintiems gyventojams įstatymas. (Nr. XI-1772, 2011-12-01, Žin., 2011, Nr. 155-7353 ,2011-12-20). <i>Lithuanian Law on Social Assistance for low income families and single persons.</i>

	<i>Amending the law (no.XI-1772 of 1 December 2011, Official Gazette no. 155-7353 of 20 December 2011).</i>
Luxem-bourg	Revenu Minimum Garanti.( Loi du 29 avril 1999, Mémorial A no. 103). ( <i>Guaranteed Minimum Income, Act of 29-4-1999, Mémorial A no. 103</i> ) .
Nether-lands	Participatiewet (wet van 2 juli 2014, Stb. 2014,270). <i>Participation Act (Act of 2 July 2014, Stb. 2014, 270).</i>
Poland	Ustawa z dnia (12 marca 2004 r. o pomocy społecznej t.j. Dz.U. z 2015, r. poz 163). <i>Social Assistance Act (12.03.2004, Journal of Laws 2015, 163).</i>
Portugal	Rendimento Social de Inserção (Lei n.º 13/2003 de 21 de Maio. <i>Social insertion income regime (Act of 21 May 2003, no. 13/2003).</i>
Romania	Legea asistenței sociale (Lege nr. 292 din 20 Decembrie 2011). <i>Law on social assistance (20 December 2011, L292/2011).</i> Legea privind venitul minim garantat (Lege nr. 416/2001, din 20 iulie 2001). <i>Law on the minimum income guarantee (20 July 2001, L416/2001).</i>
Slovenia	Zakon o socialno varstvenih prejemkih (ZSVarPre) (13.07.2010, SOP 2010-01-3350). <i>Law on Social Assistance (13 July 2010, SOP 2010-01-3350).</i>
Slovakia	Pomoc v hmotnej núdzi (Platnosť od 12.12.2013, Zákon č. 417/2013 Z. z.). <i>Benefits in material need (12 December 2013, 417/2013 Coll.).</i>
Sweden	Socialtjänstlagen (2001:453), 7-6-2001. <i>Social Services Act (7 June 2001, 2001:453).</i>
UK	Jobseeker's allowance regulations 1996 (1 February 1996, SI 1996/207) as amended by the Job Seeker's Allowance Regulations 2013 (25 February 2013 (SI 2013/378).

## **Part II:**

**Right to work and  
right to not to work**





## The right to work in neoliberal times

Vincenzo Pietrogiovanni

### Abstract

This contribution analyses the meanings and the possible roles of the right to work for a mature labour law that takes such a right seriously. In a historical perspective, the right to work has been denied or supported, according to the ruling ideology and the role of the State in society according to it. Now this right has been recognised as a human right, the most fundamental of social rights, but its justiciability is still at stake. Indeed, in recent times of neoliberal reforms in Europe, the right to work has been facing deep and diversified violations. And the challenges will be even more due to the current jobless economic recovery and transformation of capitalism through digitalisation and automation.

### 1. Introduction

This contribution represents (in a partial and shortened way) some theoretical reflections on the impact that neoliberalism has had (and still has) on one of the first historical forms of (as well as one of the most important) labour rights recognised by positive law in Western countries, i.e. the right to work. The specific context on which these theoretical reflections focus is the European one, characterised by the so-called “Great Recession”<sup>1</sup> – which generated from the 2007/2008 financial crisis in the US and then spread globally, bringing about in the European political mainstream the subsequent time characterised by austerity measures.<sup>2</sup> The geographical characterisation of the present contribution reflects the theoretical background of its analysis, which is ‘strictly’ connected to values and principles affirmed in Europe during the 20<sup>th</sup> century.

This chapter is structured as follows: firstly, a paragraph will rephrase the meanings and dimensions of the right to work, while also underlining its main restrictions. Then, the major changes due to the neoliberal paradigm in the implementation of this right will be quickly analysed. Finally, some

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<sup>1</sup> D. B. Grusky, B. Western, and C. Wimer (eds.), *The Great Recession*, Russell Sage Foundation, 2011.

<sup>2</sup> T. Callan, C. Leventi, H. Levy, M. Matsaganis, A. Paulus, and H. Sutherland, “The distributional effects of austerity measures: a comparison of six EU countries”, *EUROMOD Working Paper*, No. EM6/11, 2011.

theoretical suggestions will be considered in order to bring the right to work at the centre of gravity of labour law systems.

## 2. The right to work: an ambiguous entitlement to re-conceptualize

The right to work is a controversial and ambiguous right, yet it is one of the most important entitlements among the so-called ‘social rights’. In a capitalist economy based on mass production of goods and service, employment is a central key in order to access to social inclusion. For these reasons, some authors have considered the right to work as “the first of the social rights”,<sup>3</sup> which are based on the concept of “*social person*, that lies not only in opposition to the authoritarian experience of fascism but that overcomes definitely – in the perspective of the substantial equality and the promotion of ‘equal freedom’ of citizens – the very legal tradition of the Liberal State”.<sup>4</sup>

There are different notions of the right to work, therefore the main contents of this entitlement can be inflected in different ways. It primarily aims at fighting one of the greatest social problems created by the modern industrialisation, which is the peculiar social condition of weakness of being outside of the labour market known as unemployment.<sup>5</sup> In these terms, the first immediate concept of the right to work is the right to get a job. If we consider the traditional structure of a right, this creates a positive entitlement on the person who holds the right that is completed by a negative entitlement on another subject in form of a duty or obligation. While transposing this traditional structure to the right to work, we should argue that it is a right which implies a positive entitlement for the right-holder (the job seeker) to be recruited against a sort of negative counterentitlement on someone else other than the right-holder who, on her side, “shall” recruit the job seeker. Now, it is clear that this reconstruction does not fit into any plausible Western implementation of the right to work. Indeed, we need to stress our focus on a central element of such a structure: who has the duty to recruit a job seeker? And since it is undoubted that everyone holds the right to work, who has the duty to make sure that each citizen gets a job?

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<sup>3</sup> S. Giubboni, “Il primo dei diritti sociali. Riflessioni sul diritto al lavoro tra Costituzione italiana e ordinamento europeo”, *WP C.S.D.L.E. “Massimo D’Antona”*. INT – 46/2006, p. 5.

<sup>4</sup> S. Giubboni, “Il primo dei diritti sociali. Riflessioni sul diritto al lavoro tra Costituzione italiana e ordinamento europeo”, *WP C.S.D.L.E. “Massimo D’Antona”*. INT – 46/2006, p. 3.

<sup>5</sup> R. Salais, N. Baverez, and B. Reynaud, *L’invention du chômage: histoire et transformations d’une catégorie en France des années 1890 aux années 1980*, PUF, 1986.

In the social constitutions that were born in the 20<sup>th</sup> century, generally this duty has been put on the State's shoulders. However, is it really possible to define such a counterentitlement as a duty? And in which terms, as a moral or a legal obligation?

## 2.1. Different meanings and major restrictions

In his famous article of 1981, Bob Hepple argues that the right to work “may indicate, first, a right against the State; secondly, a right against the employer; and, thirdly, a right against workers and trade unions”.<sup>6</sup>

In the first case, Hepple defines the right against the State as the “right of the individual requiring the State to maintain a full employment policy, to protect the opportunity of every worker to earn his living in an occupation freely entered upon, to establish and maintain free employment services for all workers, and to provide and promote vocational training”.<sup>7</sup> He then refers to the main legal sources that endorse this sense of the right, such as, for instance, Art. 1 of the European Social Charter, Art. 4 of the Italian Constitution and Art. 40 of the U.S.S.R. Constitution of 7 October 1977.

As Hepple underlines, the right to work with a corresponding duty on the part of the State to provide a job for everyone has its prototype in the *droit au travail* of the Preamble of the French Constitution of 1848,<sup>8</sup> which was supported by socialist Louis Blanc but hardly contested by liberal conservative Alexis de Tocqueville<sup>9</sup> and sarcastically labelled by Karl Marx as a “pious wish”<sup>10</sup> – even though he acknowledges this right as a “power over capital”<sup>11</sup>.

In this ideological framework, it is relevant to remember that, mainly due to Louis Blanc, the right to work was implemented through the famous ‘*ateliers nationaux*’ (national workshops), organizations that were structured

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<sup>6</sup> B. Hepple, “A Right to Work?”, *Industrial Law Journal*, 1981, p. 69.

<sup>7</sup> B. Hepple, “A Right to Work?”, *Industrial Law Journal*, 1981, p. 69.

<sup>8</sup> The VII paragraph affirms: “La République doit protéger le citoyen dans sa personne, sa famille, sa religion, sa propriété, son travail, et mettre à la portée de chacun l'instruction indispensable à tous les hommes; elle doit, par une assistance fraternelle, assurer l'existence des citoyens nécessiteux, soit en leur procurant du travail dans les limites de ses ressources, soit en donnant, à défaut de la famille, des secours à ceux qui sont hors d'état de travailler. - En vue de l'accomplissement de tous ces devoirs, et pour la garantie de tous ces droits, l'Assemblée nationale, fidèle aux traditions des grandes Assemblées qui ont inauguré la Révolution française, décrète, ainsi qu'il suit, la Constitution de la République”.

<sup>9</sup> A. de Tocqueville, *Contre le Droit au Travail*, Les Belles Lettres, 2015 (new edition).

<sup>10</sup> K. Marx, ‘The Class Struggles in France: 1848 to 1850, in David McLella (ed.), *Selected Writings*, OUP, 1977, p. 569.

<sup>11</sup> K. Marx, ‘The Class Struggles in France: 1848 to 1850, in David McLella (ed.), *Selected Writings*, OUP, 1977, p. 569.

in a sort of military way and provided jobs for unemployed people in Paris after the 1848 Revolution. As these workshops did not immediately show any major results, they lasted only a few months. They were shut down because of the excessive burden on fiscal system, at that time still depending on taxpayers from rural areas, whose disappointment was increasing. Nonetheless, despite their short life, the experience of the *ateliers nationaux* is symbolic. The mechanism of these workshops definitely needed some improvement, but as soon as this operation became a tax issue, one of the biggest limitation of the right to work became clear: the cost of public investments to provide jobs and its impact on public budget. Therefore, even historically, it is directly evident that the right to work against the State has one major restriction in the limit of resources available in a certain fiscal system. But beyond this usual rhetoric, there is a phenomenon that seems to be oddly forgotten or underestimated: if more employment is created, the taxpayers' base grows, which means that the regime will distribute the tax burden from which resources for the employment measures are guaranteed on a larger number of subjects, reducing, as a consequence, the individual burden.

As for the right to work against the employer, Bob Hepple points out three aspects: the engagement, the right to be given work and the termination of employment.

As for the engagement, the right to work implies, in a negative form, first of all a prohibition of discrimination on any subjective grounds, like sex, ethnicity, religion etc. In a positive form, it may bring about compulsory forms of employing a certain group of (vulnerable) workers. The best example for the latter case is the quota system for disabled employees that countries like Germany and Italy adopt.<sup>12</sup> Another constraint on employers' prerogative to hire at their will may be the so-called 'impossible workforce' that had been in force in Italy for almost a decade in the aftermath of World War II.<sup>13</sup> According to Legislative decree n. 929/1947, containing rules on the full employment of agricultural workers, in the provinces and areas of particular agricultural unemployment, it could be possible to fix the maximum compulsory loading of working days per hectare to be introduced to the various categories of agricultural and forestry enterprises. As a result of this determination, concerned entrepreneurs were obliged by the Prefects

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<sup>12</sup> On this topic, see "The Right to Work of Persons with Disabilities: National Experiences in the EU and International Context", *Revista Derecho Social y Empresa*, Suplemento numero 1, Abril 2015; in particular, see the contributions J. Brockman and M. Banafsche, "Integration and participation of disabled persons in the labour market – The legal instruments in German Law", pp. 76-108; and P. Digennaro, "Right to work and placement of disabled in the labour market: The Italian legal framework", pp. 143-180.

<sup>13</sup> M. D'Alessio, "Evoluzione del collocamento e mercato del lavoro in agricoltura", *Mercato del lavoro e agricoltura*, 2012, pp. 13-47.

(local representatives of the Central Government) to employ the exact number of workers indicated for the province. In 1958, the constitutionality of the law was questioned in the light, above all, of the freedom of enterprise protected by Art. 41 of Italian Constitution.<sup>14</sup> So, the clash between this freedom and the right to work that the law at issue aimed to implement in an administrative way, ended with the decision of the Constitutional Court according to which an obligation on the employers to hire a certain number of workers resulted in a disproportionate violation of the constitutional freedom of enterprise.<sup>15</sup> In this sense, the freedom of enterprise is considered in terms of freedom of entrepreneurs to decide upon inter alia also the dimension of the staff employed in their business; therefore, an external pressure on employers in form of obligation to hire a certain number of agricultural workers was to be considered an unproportioned burden on the business freedom as recognised by the Italian Constitution.

Through this case on the Italian experience about mandatory recruitment in agriculture, a second major restriction on a general level is now evident: the potential conflict of the right to work with the entrepreneurial prerogatives and the succeeding balancing made by case law in the light of the proportionality principle.

As for the termination of employment, it is undoubted that there is a strong association between the principle of employment stability and the right to work. To this regard, the concept of unfair dismissal has been introduced as a legal restriction to the free will of the employers to dismiss their employees. Managerial prerogatives are thus restricted in a way that all dismissals must be based on just causes or justified motive (i.e., personal or economic grounds). However, the main problematic aspect on this matter for the legislature seems to be more likely the sanctions in case of unfair dismissal; legal systems in Europe have usually two main sanctions: compensation and reinstatement. The rationale of this normative approach can be found in the social responsibility of the employer, who shall respect the freedom and dignity of the employee also during the termination of the employment contract. Many more reflections can be done on the importance of reinstatement as a deterrent for the employer and a positive support for the freedom of the employee during the employment relationship, but unfortunately the short room for this contribution cannot permit such a useful digression. In these terms, the right to work can be understood as a positive freedom, in the sense that it constitutes the “guarantee of formal and substantial equality of the persons in relationship to the available

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<sup>14</sup> F. Galgano, ‘Art. 41’, *Commentario della Costituzione*, 1982, p. 4; P. Cavaleri, *Iniziativa economica privata e costituzione “vivente”: contributo allo studio della giurisprudenza sull’Art. 41 Cost.*, CEDAM, 1978.

<sup>15</sup> Constitutional Court n. 78 of 16 December 1958.

employment, an equality that means a balance concurrence among the persons and safety from the abuses connected to personal qualities, in both the labour market and in the employment relationship”.<sup>16</sup>

Beside the third meaning of the right to work against the trade unions, which is not object of any discussion in this chapter, nevertheless another meaning can be added to the fundamental categorization made by Bob Hepple; this takes into consideration the right to work as a right of freedom. According to this notion, indeed, everyone should not be forced to work or to choose a specific work against her will. This freedom, which is protected by the explicit prohibition of forced or compulsory labour<sup>17</sup>, is directly addressed against the State or any other public authorities.

## 2.2. The lack of justiciability

The right to work is a peculiar right, because it is not freestanding but its exercise (i.e. its fulfilment) depends from the legislature and the organizational apparatus created in order to satisfy it. Unlike the freedom of association, the right to work is not fulfilled by the simple abstention of law, on the contrary it requires the public authority to intervene and drive the labour market towards a certain direction. In this way, it is a social right of the kind that is structured as an entitlement to ask for a positive action from the State. It represents also “a fundamental right of freedom of the human being that expresses itself in the choice and in the way of exercise of a working activity”,<sup>18</sup>.

Nevertheless, the recognition of this right as a fundamental one is not an issue, as many international laws and national constitutions recognize it;<sup>19</sup> its ambiguity lies indeed in its effectiveness or, even more, in its justiciability.

Can an employer be forced to hire one person? Or can that very same person sue the employer or the State if they fail to offer her a suitable job?

The right to work has functioned in modern Welfare State as a duty of the State to organize and implement policies and instrumental bodies, according to the different levels of competence and responsibility in which the public leverage acts, aiming to achieve the goal of full employment. There is no

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<sup>16</sup> M. D’Antona, “Il diritto al lavoro nella Costituzione e nell’ordinamento comunitario”, now in M. D’Antona, *Opere*, vol. I, *Scritti sul metodo e sulla evoluzione del diritto del lavoro. Scritti sul diritto del lavoro comparato e comunitario*, B. Caruso e S. Sciarra (eds.), Milano, 2000, p. 268.

<sup>17</sup> See the ILO Forced Labour Convention, 1930 (No. 29) concerning Forced or Compulsory Labour, considered as one of the four core labour standards by the 1998 ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up.

<sup>18</sup> Italian Constitutional Court, case n. 45 of 1965 (translated by the author).

<sup>19</sup> V. Mantouvalou (ed.), *The Right to Work: Legal and Philosophical Perspectives*, Hart Publishing, 2015.

legal room for individual claiming but a political request towards the State to put in place opportune actions on supply and, above all, demand of labour. To this regard, two elements were fundamental during the aftermath of World War II: Fordism and Keynesianism. Both of them were based on a social bargaining between capital and labour that made sure, through a mutual support, that no one of the parties would have aimed to destroy the other party. Full employment as a political goal and decent levels of wage as a social purpose accepted by employers and employees' organisations were fundamental tools to boost economic growth through the consumption of goods produced by the big industry. This alliance guaranteed to Western countries surprising levels of wealth (the economic boom) distributed in a balanced way, and a strengthening of democratic institutions, even within the factories, with the spread of workers' right of representation, participation and conflict. Fordism and Keynesianism are now dissolved.<sup>20</sup> And inequalities of wealth distribution have been constantly rising.<sup>21</sup> The effectiveness of the right to work has been put deeply in trouble, indeed, perfectly represented by the growing figures of unemployment in last decades, has been jeopardised also by the radical shift in the political, social and economic paradigms brought about by neoliberalism.

### 3. The neoliberal version of the right to work

As Saad-Filho and Johnston affirm in the opening on their book published more than 10 year ago, "we live in the age of neoliberalism".<sup>22</sup> According to David Harvey, "neoliberalism is in the first instance a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets and free trade. The role of the state is to create and preserve an institutional framework appropriate to such practices. The state has to guarantee, for example, the quality and integrity of money. It must also set up those military, defence, police and legal structures and functions required to secure private property rights and to guarantee, by force if need be, the proper functioning of markets."<sup>23</sup>

Whether we define neoliberalism just as a theory of political economic practices or even, in a wider perspective, a totalizing paradigm of men and

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<sup>20</sup> R. B. Reich, *Aftershock: the next economy and America's future*, Vintage Books, 2013.

<sup>21</sup> See the famous T. Piketty, *Le capital au XXI<sup>e</sup> siècle*, Le Seuil, 2013.

<sup>22</sup> A. Saad-Filho and D. Johnston, *Neoliberalism: A critical reader*, University of Chicago Press, 2005, p. 1.

<sup>23</sup> D. Harvey, *A Brief History of Neoliberalism*, OUP, 2005, p. 2.

society (i.e. an ideology!), the ways it has been affecting labour law for the last decades are nevertheless severe. The neoliberal recipe as we have been facing in Europe is based on government's expenditure cuts, especially on social systems, wage deflation, decrease of taxes on property, reforms of labour market in order to introduce massive doses of flexibility. This cluster of different actions represents almost the opposite of the Keynesian recipe, which on its hand called for public investments, increase of taxes for the richer and stimulation of the aggregate demand.

Despite the manifest incapability of forecasting the financial catastrophe of 2007/2008 and the subsequent decade of economic crisis in form of stagflation – which should have warned in the first place about the feasibility of such an economic theory, neoliberalism was even more boosted in the wake of the crisis by the plans of the so-called 'Troika' for countries asking financial help (like, for instance, Spain, Portugal and Greece), or suggested reforms for countries in struggle (such as France or Italy).

Despite the economic recovery, the unemployment rates still remain quite high if compared to non-EU countries, as Figure 1 shows below.

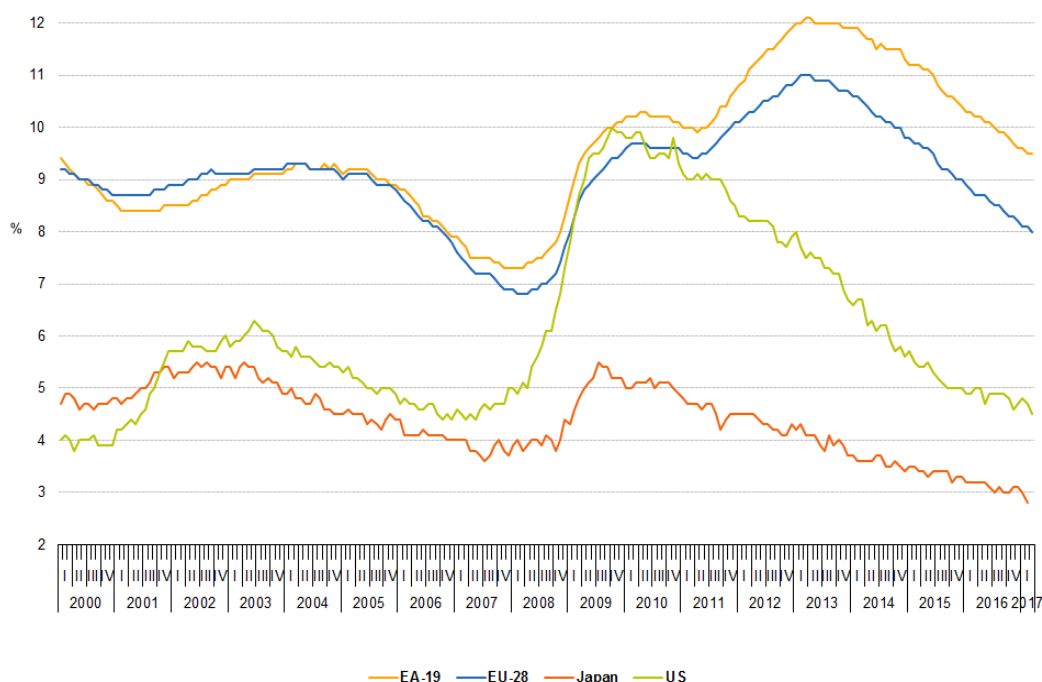


Figure 1. Unemployment rates EU-28 EA-19 US and Japan seasonally adjusted January 2000 April 2017. Source: Eurostat



As young people were among the most vulnerable groups of persons to be hit by the crisis, in 2012, the General Conference of the ILO issued a resolution in 2012, “*The Youth Employment Crisis: A Call for Action*”, which suggested to take a multi-pronged approach with measures to foster pro-employment growth and decent job creation through macroeconomic policies, employability, labour market policies, youth entrepreneurship and rights to tackle the social consequences of the crisis, while ensuring financial and fiscal sustainability. This report highlighted that the full employment should be a key objective of macroeconomic policies and that economic, employment, education and training, and social protection policies require being effectively coherent and coordinated; moreover, it suggested that pro-employment macroeconomic policies should support stronger aggregate demand and improve access to finance, through labour-intensive public investment in large-scale infrastructure and public employment schemes in order to generate new decent employment opportunities while meeting social needs and improving infrastructure.

But these principles have been scarcely implemented, since they openly question the neoliberal dogma. If one wants to trace the main elements that characterise the neoliberal shift in labour law approach towards the right to work, these could be: the unilateral supply-side employment policies, the heavy conditionality of the so-called active labour market policies, and the decrease of firing costs.

While evidence shows that we seem to face a jobless recovery,<sup>24</sup> the main employment policies still focus only on the supply-side of the labour market. According to the current mainstream rhetoric, the problem to solve is the mismatch between the offer and the demand of work; therefore, the best policies to be implemented shall not aim to increase the employment demand (through public investments, for example) but to improve the employability of jobseekers and unemployed persons. Here comes the activation as the keystone of the all neoliberal approach to labour market inclusion, which goes along with a certain moral characterisation: if someone is not able to find a job, then it is her fault; hence, that person must activate herself in order to much better fit the requests of the market. This peculiar sense of morality shifts the responsibility of being unemployed in an indirect way on unemployed persons rather than on the State or on the employers. In this sense, neoliberal employment policies are also always accompanied by the principle of conditionality, according to which unemployment benefits should be recognised only if the unemployed person has gone through certain strictly programmed activities. Often, especially for

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<sup>24</sup> See International Labour Organization Report, *Global Employment Trends 2014. Risk of a jobless recovery?*, International Labour Office, 2014.

long-term unemployed, the refusal of any job whatsoever or wherever it comes from (even hundreds of kilometres away from home) is a *conditio sine qua non* for being still enrolled into employment programs. These restrictions implied in conditionality may bring about problems of conflict against the right to work in its dimension of freedom to get a job that suits one's interests, ambitions and working ability. Moreover, the general rhetoric behind such schemes of active labour market policies may transcend even the first major dimension of the right to work against the State: on one side, the State seems not be required anymore to fulfil the goal of full unemployment or to act at any macroeconomic level, on the other side the burden of finding a job is completely shifted on unemployed people's shoulders, creating on them not only legal obligations but also a sort of moral guilt for their condition of being unfit to the market's needs.

Another big scarf on labour law created by neoliberal reforms is represented by the general weakening of employment protection, above all in case of unfair dismissals. One of the best example comes from Italy. The recent reforms package, called "Jobs Act",<sup>25</sup> has heavily flexibilised Italian labour market, intervening in many fields, from the legislation about fixed-term contracts (which now foresees no grounds for contracts up to 36 months, with a limitation of 20% of the total staff, and a maximum of 8 extensions in three years), apprenticeship, tasks, posting of workers and other strong aspects of the employment protection;<sup>26</sup> but the acme of this program has been reached with the introduction in 2015 of the *contratto a tutele crescenti*, literally translated as the employment contract at increasing protections. It is not really a new employment contract, but rather the reform provides a new discipline on remedies in case of unlawful dismissal – which had been already reformed (for the worse) in 2012 during the Monti Government<sup>27</sup> – for the newly recruited employees. Indeed, according to this new scheme, everyone employed after March 2015, in case of unfair dismissal will receive a compensation not subject to social security contribution for an amount equal to two months of total salary for each year of seniority, from a minimum of four to a maximum of twenty-four months; reinstatement is now possible only in case of discriminatory, void or orally

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<sup>25</sup> V. Speziale, "Le politiche del lavoro del Governo Renzi: il Jobs Act e la riforma dei contratti e di altre discipline del rapporto di lavoro", *WP CSDLE "Massimo D'Antona"*, 2014, p. 1.

<sup>26</sup> S. Cucciovino, "Il sistema sanzionatorio del contratto a termine e della somministrazione di lavoro dopo il Jobs Act", *Giornale di diritto del lavoro e di relazioni industriali*, n. 148, 2015, pp. 611-623.

<sup>27</sup> V. Speziale, "La riforma del licenziamento individuale tra diritto ed economia", *Rivista Italiana di Diritto del Lavoro*, 3, 2012, p. 521.

ordered dismissal.<sup>28</sup> The result is an inherent instability of this contract that is formally open ended but in substance can be always terminated in any time the employers want (they just need to evaluate in advance if the firing cost will be feasible or not). It is not by chance that the new rules subsequently brought about a sharp increase of dismissals.<sup>29</sup> The employers got two benefits out of this reform: on the one hand, dismissals are less restricted and cheaper than before, which gives them the certainty in the cost of each dismissal; on the other hand, employers gain a major power in the relationship with the employees, since the deterrent force of reinstatement in case of unlawful dismissal has become now only a very rare hypothesis. In fact, employees to whom the “Jobs Act” is applicable can hope for reinstatement only if they manage to prove the presence on any discriminatory intent in the dismissal (and everybody is aware of how often it is impossible to prove it).

So, even though the result of this reform is a deep deterioration of working conditions and employment protection, the economic rationale behind this reform of labour law is to overcome the duality of the labour market created by the gap between the very protected insiders and the very weak outsiders. The problem is that this strategy will end up in creating an “equality in the insecurity”.<sup>30</sup>

#### 4. Taking the right to work seriously

The way a certain legal system recognises and conceives the right to work tells a lot about the idea of legal system itself (*rectius*, the State) and citizenship enshrined in its economic and social constitution.

There is a historical link between the right to work and the status of citizenship as reaffirmed after the political and cultural revolutions of 19<sup>th</sup> century. If we consider the French constitutions after 1789, we can realize that work is meant not only as an instrument to earn the resources that are necessary to face needs and wills but also as a mean to become a full citizen of the *République*, as seen above.<sup>31</sup>

<sup>28</sup> E. Ghera, D. Garofalo (eds.), *Le tutele per i licenziamenti e per la disoccupazione involontaria nel Jobs Act 2. Commento ai decreti legislativi 4 marzo 2015, nn. 22 e 23, in attuazione della legge 10 dicembre 2014, n. 183*, Cacucci Editore, 2015.

<sup>29</sup> Osservatorio sul Precariato, Dati sui nuovi rapporti di lavoro, Monthly Report January-December 2017. See also R. Ciccarelli, ‘Jobs Act, aumentano i licenziamenti, giù i contratti stabili’, *il Manifesto*, 28 April 2017.

<sup>30</sup> U. Romagnoli, “Il diritto del lavoro nel prisma del principio di uguaglianza”, in M. Napoli (ed.), *Costituzione, Lavoro, Pluralismo Sociale*, Vita e Pensiero, 1998, p. 33.

<sup>31</sup> See paragraph 2.1.

In a certain way, also the reference to the work that is cherished in Art. 1 of Italian Constitution – according to which “Italy is a democratic Republic funded on work” – endorses the meaning of work as a right of citizenship, i.e. a right that gives to human beings the possibility of full enjoyment of citizens that are all free and equal.<sup>32</sup> This idea is a concept of the State that is structured on the principle of the rule of law and calls against the remaining of the feudal system based on the privileges rather than on rights and duties, as it used to be under the monarchy.

A very authoritative Italian labour law scholar, Massimo D’Antona, in his last work before that the appalling violence of Red Brigades took his life away, reflects on the right to work to be “taken seriously” by elevating it to “its aspired-to status as the cardinal norm of the labour law system”.<sup>33</sup>

D’Antona analyses the nature of the right to work in the European countries that are different from the national (Italian) context: the right has kept its link with growth and wealth but, on the other side, it has lost its historical link towards the concept of stability of work, or the idea of uniformity of the labour market. As he explains, “(a)lthough it maintains its axiological and perspective valence, the right to work, both as an expectation and as the right to have a job, seems to be shifting its centre of gravity towards the “being” or “person”, which means that such a right needs to be updated “as a guarantee of being rather than having”.<sup>34</sup>

Pushing this line of reasoning even further, the lack of justiciability of the right to work can be compensated by the idea of empowerment of workers’ freedom enclosed in the concept of *capabilities* and its framework aiming to personal and professional self-realisation.<sup>35</sup>

Nevertheless, as a commentator of D’Antona’s reflections notices, “with its soft law in employment policies; with its austerity that hits many working people or jobseekers; with its promises to transform stable employment in employability, Europe throws out from the windows the right to work that has been walked in through the door. In other words, if a ‘right’ is reduced to a ‘principle’, it is easy to be compressed by conditionings made up as

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<sup>32</sup> L. Mengoni, *Fondata sul lavoro: la Repubblica tra diritti inviolabili e doveri inderogabili di solidarietà*, Vita e pensiero, 1998, now in L. Mengoni, *Il lavoro nella dottrina sociale della Chiesa*, M. Napoli (ed.), Vita e pensiero, 2004; G. Loy, “Una repubblica fondata sul lavoro”, *Giornale di Diritto del Lavoro e di Relazioni Industriali*, n. 122, 2009, pp. 197-238.

<sup>33</sup> M. D’Antona, “The Right to Work in the Italian Constitution and in the European Union”, *W.P. C.S.D.L.E. “Massimo D’Antona” N.1/2002*, p. 2.

<sup>34</sup> M. D’Antona, “The Right to Work in the Italian Constitution and in the European Union”, *W.P. C.S.D.L.E. “Massimo D’Antona” N.1/2002*, p.10.

<sup>35</sup> On this vast topic, see R. Salais and R. Villeneuve (eds.), *Europe and the Politics of Capabilities*, Cambridge University Press, 2005; and more recently R. Rogowski, E. Salais and N. Whiteside (eds.), *Transforming European Employment Policy: Labour market transitions and the promotion of capability*, Edward Elgar Publishing, 2011.

dogmas carved in stone, whereas they are nothing else than precise political choices”.<sup>36</sup>

The right to work is the most important social right because it protects not only the patrimonial interests related to the work as an economic or financial value (the resources to conduct a life that should be free and decent), but above all the social citizenship, which means the inherent dimension of human beings as social animals protected in their struggle to get a meaning for their activities, or for their lives in the society. To this regard, the right to work can be translated into the right to a decent work.<sup>37</sup>

With the increasing fragmentation of the labour market, due to the rise of non-standard form of employment contracts – sometimes at the limit of exploitation, such as many cases of zero-hour contracts – or the expansion of autonomous collaborations (even though often it is just false self-employment) that is connected to the so-called ‘gig economy’ or ‘platform economy’, being active in the labour market does not necessarily mean anymore that working people would enjoy fair and decent terms and conditions of work or an equitable remuneration. Indeed, if we look at this new reality, we will see that the vast majority of the new jobs are precarious and low paid.<sup>38</sup> This means that unemployment is not anymore the only problem that endangers social inclusion and wealth equality.

## 5. Conclusion

In the age of neoliberalism, in which the ideology of the total market<sup>39</sup> prevents the State to intervene in the economy through any kind of macroeconomic policy, and the capital is rapidly going into a deep and irreversible transformation driven by the development of digitisation and automation, the right to work, without any meaningful judiciary tool of enforcement and justiciability, shows all its 18<sup>th</sup> century limitations, especially in not being able to fight against the persistent jobless growth and the exploitation of working people.

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<sup>36</sup> M. Rusciano, “Il pensiero di Massimo D’Antona sul diritto al lavoro”, *WP CSDLE “Massimo D’Antona.IT – 216/2014*.

<sup>37</sup> D. P. Ghai (ed.), *Decent work: objectives and strategies*, International Labour Organisation, 2006.

<sup>38</sup> J. Webster, “Microworkers of the Gig Economy: separate and precarious”, *New Labor Forum*, Vol. 25. No. 3, 2016, pp. 57-64; V. De Stefano, “The Rise of the Just-in-Time Workforce: On-Demand Work, Crowdwork, and Labor Protection in the Gig-Economy”, *Comparative Labor Law & Policy Journal*, Vol. 37, Issue 3, pp. 471-504.

<sup>39</sup> A. Supiot, *L’Esprit de Philadelphie. La Justice Sociale face au Marché Total*, Seuil, 2010.

However, if the right to work ‘gives up’, there will be the urgent need to rethink not only the labour law systems but, more radically, other grounding instrument to affirm and consolidate the citizenship in society.

New studies on the probable not so far away technological mass unemployment to which the rise of robots and algorithms seems to condemn the future generations<sup>40</sup> are only improving the urgency of considering the issue right now. This new fashion of preoccupations, indeed, does only change a bit the main questions interrogating all the stakeholders.

If employment can be casual, low paid and precarious, or if we do not need to work anymore because a machine can work (better) for us, then what else other than work will make us still being free and equal citizens in a democracy and prevent us to be deteriorated in vassals and serfs before an authoritarian State?

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<sup>40</sup> *Inter alia*, P. K. McClure, “‘You’re Fired,’ Says the Robot: The Rise of Automation in the Workplace, Technophobes, and Fears of Unemployment’, *Social Science Computer Review*, 2017, pp. 1-18.

## **Blurred boundaries between work and leisure A German perspective**

Reinhard Singer,  
Stephan Klawitter and Friedrich Preetz

### **Abstract**

Digitisation revolutionised the way enterprises work and has already profoundly changed working conditions. Employees can be assigned flexibly and are able to take up work from anywhere in the world making use of smartphones and cloud-solutions. Employees increasingly run the danger of being exposed to the phenomenon of *constant availability*. While employees' opinions as regards these developments differ – some find them challenging, others welcome the new opportunities facilitated by digitisation – Working Time Law is put to the test.

German as well as European Working Time Law strictly distinguish between the categories of working time and rest periods. Times of *constant availability* are generally to be considered as compulsory resting time. Issues arise because the European Working Time Directive (WTD) requires that rest periods have to be granted *uninterruptedly*. Even the smallest of interruptions amount to working time, having the effect that rest periods begin anew after each interruption. The authors argue that activities can, however, only be considered to be working time if they are attributable to employers. To attenuate the dangers of *constant availability*, the German legislator could make further use of the freedoms provided for by the WTD that allow social partners to flexibly regulate working time and rest periods. This would eliminate the current grey area to a certain extent while respecting employees' interests.

The authors further argue that current Working Time Law does not adequately acknowledge employees' individual rights. Employees have a right to unavailability as well as a right to working time flexibility backed by constitutional fundamental rights. Legislators should introduce regulation to emphasise these rights. The German legislator could, for example, provide room for derogations from otherwise mandatory working time provisions in individual contracts. The WTD generally allows for more flexibilisation.

## 1. Working time and digitalisation

### 1.1. The influence of technological advances on working processes

The developments of the *world wide web* allow for working models in which resources can be allocated and combined flexibly across borders and companies.<sup>1</sup> Cloud-solutions and mobile applications enable employers to integrate employees into workflows anytime, anywhere. To the same extent, central monitoring of work processes ceases to be important. Employees run the risk of exceeding the agreed working hours as employers' focuses turn from locally and temporally predetermined workflows to specific outcomes of work.<sup>2</sup> The Japanese phenomenon of "*karoshi*", death by overwork, shows that this development can have devastating consequences for employees. A study conducted by the Japanese government found that in 2015 alone, 93 people died or attempted to commit suicide for this reason. The Swiss newspaper *Neue Zürcher Zeitung* reported of a 27 years old man who died of a heart attack in 2016 after he, supposedly, worked up to 122,5 hours of overtime in a single month.<sup>3</sup> A recent example from Poland, where several deaths resulting from overwork sparked massive protests against the underfunded Polish Health Service, demonstrates that the phenomenon of "*karoshi*" has long arrived in Europe.<sup>4</sup>

### 1.2. Advantages and disadvantages of temporally and locally "delimited" work

The temporal and local "*delimitation*"<sup>5</sup> of work blurs the borders between work and leisure.<sup>6</sup> This development is judged differently by employees.<sup>7</sup> While quite a few are critical of the mingling of work and their private sphere, advocates of mobile reachability see it as an advantage that they can better reconcile work and private life by means of such work models.<sup>8</sup> It has

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<sup>1</sup> R. Krause, *Gutachten zum 71. Deutschen Juristentag*, C.H.Beck, 2016, B 19.

<sup>2</sup> R. Krause (fn. 1), B 17 f.

<sup>3</sup> <https://www.nzz.ch/wirtschaft/wirtschaftspolitik/karoshi-bewegt-die-gemueter-japan-arbeitet-sich-zu-tode-ld.123890> [accessed 22 February 2018].

<sup>4</sup> <https://www.deutsche-apotheker-zeitung.de/news/artikel/2017/10/17/polnische-aerzte-im-hungerstreik> [accessed 22 February 2018].

<sup>5</sup> R. Krause (fn. 1), B 18 fn. 64 with further references as regards this term (in German "*Entgrenzung*").

<sup>6</sup> R. Krause (fn. 1), B 18.

<sup>7</sup> Federal Ministry of Labour and Social Affairs (BMAS), *Weißbuch Arbeiten 4.0* ([https://www.bmas.de/SharedDocs/Downloads/DE/PDF-Publikationen/a883-weissbuch.pdf?\\_\\_blob=publicationFile](https://www.bmas.de/SharedDocs/Downloads/DE/PDF-Publikationen/a883-weissbuch.pdf?__blob=publicationFile) [accessed 22 February 2018]), 2017, p. 73.

<sup>8</sup> BMAS, *Mobiles und entgrenztes Arbeiten* (<https://www.bmas.de/SharedDocs/Downloads/DE/PDF->



also long become common for employers to make a healthy *work-life-balance* a key promise of employee recruitment.<sup>9</sup>

## **2. Constant availability and working time law**

### **2.1. Legal status of employees in European and German working time law**

In Germany, the law on working time is regulated by the Working Time Directive (Dir. 2003/88/EG, short WTD) and the German Working Time Act (Arbeitszeitgesetz, short ArbZG). Primary goal of both regulations is the protection of workers' health and safety.<sup>10</sup> Both European and German law also aim to flexibilise working hours, with the ArbZG recognising both objectives as being of equal importance<sup>11</sup>, while the WTD expressly makes flexibilisation subject to the compliance with the principles of protecting the safety and health of workers<sup>12</sup>.

#### **2.1.1. Working time and restp as categories of working time law**

Working Time Law prominently distinguishes between working time<sup>13</sup> and rest periods<sup>14</sup>. The distinction is of particular importance with regard to the limitation of the working day to eight hours, § 3 1 ArbZG, and the mandatory rest period of at least eleven hours, § 5 subs. 1 ArbZG. Due to the fact that the latter has to be granted "*uninterruptedly*", grave practical problems arise<sup>15</sup>: An employee who communicates with his employer in the evening at 11:00 pm, by making a phone call or writing an e-mail, is barred from resuming his or her work at 10:00 am, as the nightly activity qualifies as work. Even the shortest work-related activity is categorised as working time and leads to an end of the rest period, which begins anew after each

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Publikationen/a873.pdf?\_\_blob=publicationFile&v=2 [accessed 22 February 2018]), 2015, p. 14.

<sup>9</sup> Self-attributions such as "*We want motivated and committed employees. We support you in reconciling family and work because we think a balancing work and private life is important.*" ([https://www.siemens.de/jobs/arbeiten\\_bei\\_siemens\\_de/moderne-arbeitswelten/seiten/home.aspx](https://www.siemens.de/jobs/arbeiten_bei_siemens_de/moderne-arbeitswelten/seiten/home.aspx), in German [accessed 17 March 2017]) have long become part of employee advertising.

<sup>10</sup> Cf. recital 11 WTD and § 1 no. 1 ArbZG.

<sup>11</sup> § 1 no. 1 ArbZG.

<sup>12</sup> Cf. recital 15 WTD.

<sup>13</sup> Cf. Art. 2 no. 1 WTD and § 2 subs. 1 1 ArbZG.

<sup>14</sup> Cf. Art. 2 no. 2 WTD as well as § 5 ArbZG.

<sup>15</sup> L. Stärker, *Kommentar zur EU-Arbeitszeit-Richtlinie*, Linde, 2006, 60 f.; U. Baeck and M. Deutsch, *ArbZG Kommentar*, C.H.Beck, 3<sup>rd</sup> ed. 2014, § 5 par. 13.

interruption. Only in narrowly confined cases does the law allow deviations from § 5 subs. 1 ArbZG. § 5 subs. 2 and 3 ArbZG allow for contractual reductions of the rest period by one or two hours respectively, but only in certain industries (eg. hospitals, broadcasting, livestock breeding). Also, according to § 7 subs. 1 no. 3, subs. 2 no. 1 and 2, subs. 2a ArbZG collective agreements or company agreements may allow for shortened rest periods. In addition, under certain conditions, the supervisory authority can grant exemptions from § 5 subs. 1 ArbZG, § 15 subs. 1 no. 3 and 4, subs. 2 ArbZG. With the exception of § 7 subs. 2a ArbZG, all reductions are required to be balanced out within a specific or to-be-specified period. Seeing that these consequences conflict with the flexibility required by modern working life, it has oftentimes been argued that activities outside of the *conventional* working hours should not be qualified as working time. Seeing that the categories of working time and rest periods are established and in principle irrefutable, these attempts must to be deemed problematic. According to the judicature of the CJEU (medical) on-call duty has to be qualified as working time because employees are required to remain apart from their family and social environment.<sup>16</sup> Conversely, in constellations in which workers must be constantly available, but without being obliged to be present – so-called stand-by duty – only the time spent on the actual provision of services should be regarded as working time.<sup>17</sup> Accordingly, the case law of the German Federal Labour Court (BAG) is such that so-called work readiness and on-call duty<sup>18</sup> are characterised by the fact that the employer may determine the whereabouts of the employee<sup>19</sup>. In the case of on-call duty, the employee does not necessarily need to be at his work place, but must be able to commence his full work activity immediately<sup>20</sup> if called upon by the employer.<sup>21</sup> If the whereabouts are not specified by the employer, in other words if the employee is free to choose the place where he is staying and where he will perform his tasks, the activity is categorised as stand-by, not on-call, duty.<sup>22</sup> Times of stand-by duty are generally

<sup>16</sup> CJEU NJW 2003, 2971, 2974 (*Jaeger*) (= Case C-151/02 [2003] ECLI:EU:C:2003:437).

<sup>17</sup> CJEU NZA 2000, 1227, 1230 (*SIMAP*) (= Case C-303/98 [2000] ECR I-7997).

<sup>18</sup> Cf. as regards the different categories R. Wank, “Facetten der Arbeitszeit”, *Recht der Arbeit*, 2014, 285, 287.

<sup>19</sup> Note, however, that according to § 18 subs. 1 no. 1 ArbZG, the ArbZG does not apply to *executive employees* in the sense § 5 subs. 3 German Federal Works Constitution Act (BetrVG).

<sup>20</sup> BAG NZA 2007, 1108, 1109.

<sup>21</sup> M. Kock in C. Rolfs, R. Kreikebohm et al. (eds.), *BeckOK Arbeitsrecht*, C.H.Beck, 43<sup>rd</sup> ed. 2017, § 2 ArbZG par. 6.

<sup>22</sup> M. Kock (fn. 21), § 2 ArbZG par. 10; R. Buschmann and J. Ulber, *Arbeitszeitgesetz*, Bund-Verlag, 8<sup>th</sup> ed. 2015, § 2 ArbZG par. 21; R. Falder, “Immer erreichbar – Arbeitszeit- und Urlaubsrecht in Zeiten des technologischen Wandels”, *Neue Zeitschrift für Arbeitsrecht*, 2010, 1150, 1151.

considered as rest periods unless the employer actually calls for the employee's work. Only if this is the case, the time period is qualified as working time.<sup>23</sup>

### **2.1.2. Constant availability and categories of working time law**

The phenomenon of constant availability of employees puts these categories to the test. In contrast to (medical) on-call duty constantly available employees generally remain in their home environments and might actually act on their own initiative when reading and immediately answering e-mails. Only seldom do employers and employees enter into explicit contractual arrangements as regards constant availability. Rather, the phenomenon is characterised by a mélange of subliminal expectations on the part of employers and an anticipatory obedience of employees, whereby the circumstances differ considerably from one case to another.

#### ***a) Is constant availability a case of on-call duty?***

The essence of constant availability is its general leisure character. It is therefore to be categorised either as on-call duty (working time) or stand-by duty (in principle rest time, working time if called upon). According to the judicature of the BAG, stand-by duty and on-call duty are distinguished on the basis of the time left to take up work. The BAG argues that strict confines as regards the time in which work has to be taken up, lead to an indirect determination of the whereabouts of employees.<sup>24</sup> It is therefore sometimes argued that mobile availability has to be regarded as on-call duty, if employees are expected to react within a short period of time.<sup>25</sup> This distinction on the basis of the time remaining to take up work can, however, not be applied to cases of constant availability.<sup>26</sup> While it is true that employees faced with delimited forms of work carry the means necessary to take up work and therefore their "workplace" with them<sup>27</sup>, the BAG adopted the temporal criterion in a case where an employee was severely restricted in how he spent his time off work because he had to actually show up at his permanent workplace if called upon<sup>28</sup>. In another case, where an employee was required to carry a mobile phone, but could perform tasks remotely, the

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<sup>23</sup> BAGE 95, 210, 214; R. Wank, "Facetten der Arbeitszeit", *Recht der Arbeit*, 2014, 285, 287.

<sup>24</sup> Cf. BAG NZA 1992, 560.

<sup>25</sup> R. Buschmann and J. Ulber (fn. 23), § 2 par. 26.

<sup>26</sup> With reference to the judicature of the BAG also critical R. Krause (fn. 1), B 37 f.

<sup>27</sup> Insofar one has to agree with R. Buschmann and J. Ulber (fn. 23), § 2 par. 26.

<sup>28</sup> BAG NZA 1992, 560.

BAG found that this would constitute stand-by duty.<sup>29</sup> Seeing that employees can devote themselves to leisure activities and only have to do work for the employer if necessary, this classification has to be applied to constant availability as well. Constant availability is therefore a case of stand-by duty.<sup>30</sup> This is also in line with the criteria the CJEU set out when assessing medical on-call duty.<sup>31</sup> The decisive factor is therefore whether the employee must remain apart from his family and social environment (on-call duty) or not (stand-by duty).

**b) Constant availability as own category between on-call duty and stand-by duty?**

The aforementioned categorisation is dissatisfactory as employees are also strained during stand-by duty and therefore suffer from a loss of recreational value.<sup>32</sup> It has therefore been proposed to introduce a new category into working time law set between on-call duty and stand-by duty, working time and rest periods, in order to set specific limits to delimited work of employees.<sup>33</sup> Such a proposal is worth considering, but would require changes to the WTD, as the directive only distinguishes between working time and rest periods. The CJEU has repeatedly stated that the Member States are bound by the European Law definition of working time and that the terms "working time" and "rest period" are therefore not at the discretion of the Member States.<sup>34</sup> However, the WTD provides several provisions which Member States can make use of to allow derogations from the strict set of rules. Member States can, for example, allow derogations on account

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<sup>29</sup> BAGE 95, 210, 213 f. – Consider, however, that the court decided on a particular form of stand-by duty regulated by a collective agreement (§ 15 subs. 6b BAT). There, on-call duty is defined as follows: “[The employee is required to], at the employer's request, stay at a location specified by the employer in order to take up work on call of the employer.” (BAGE 90, 210, 212). This specific on-call duty is, however, congruent with the understanding of on-call duty outlined in this paper.

<sup>30</sup> This corresponds with the prevailing opinion in German-speaking literature, cf. R. Krause (fn.1), B 38; R. Falder, “Immer erreichbar – Arbeitszeit- und Urlaubsrecht in Zeiten des technologischen Wandels”, *Neue Zeitschrift für Arbeitsrecht*, 2010, 1150, 1151; W. Kohte, “Arbeitsschutz in der digitalen Arbeitswelt”, *Neue Zeitschrift für Arbeitsrecht*, 2015, 1417, 1423; R. Wank, “Facetten der Arbeitszeit”, *Recht der Arbeit*, 2014, 285, 288 f.; M. Jacobs, “Reformbedarf im Arbeitszeitrecht”, *Neue Zeitschrift für Arbeitsrecht*, 2016, 733, 735 f.

<sup>31</sup> CJEU NJW 2000, 1227, 1230 par. 50 (*SIMAP*); NZA 2003, 2971, 2974 par. 65 (*Jaeger*).

<sup>32</sup> R. Krause (fn. 1), B 46; W. Kohte, “Arbeitsschutz in der digitalen Arbeitswelt”, *Neue Zeitschrift für Arbeitsrecht*, 2015, 1417, 1423.

<sup>33</sup> Sceptical G. Thüsing, “Digitalisierung der Arbeitswelt - Impulse zur rechtlichen Bewältigung der Herausforderung gewandelter Arbeitsformen”, *Soziales Recht*, 2016, 87, 98.

<sup>34</sup> CJEU NJW 2003, 2971, 2973 (*Jaeger*); EuZW 2006, 121, 123 (*Dellas*) (= Case C-14/04 [2005] ECR I-10279).

of the specific characteristics of the activity concerned, Art 17 WTD, or place certain derogations at the disposal of the social partners, Art 18 WTD. The German legislator has not made full use of these clauses and could therefore develop a more flexible national Working Time Law.<sup>35</sup>

**c) Attribution of activities performed by employees**

Nonetheless, if employees do work outside their regular working hours by writing job-related e-mails or making phone calls, the question arises whether these activities should qualify as work even if they were not initiated by the employer.

Art 2 no. 1 WTD and § 2 subs. 1 ArbZG define working time as the time from the beginning to the end of work excluding breaks. The recently introduced § 611a subs. 1 1 BGB defines “work” – in accordance with the common definition adopted by the BAG – as the provision of services in personal dependence, bound by instructions and determined by others. The phrases following this definition show the importance of the criterion of “dependency” to the concept of work: Employees are those “who essentially cannot freely specify their work and determine their working hours” (§ 611a subs. 1 3 BGB). When assessing whether activities amount to “work” in the sense of Working Time Law, this definition has to echo. Thus, it is not sufficient that an employee works for the employer. Rather, a certain activity must be the specific result of the employee's dependency on the employer. Otherwise, employees could bar themselves from working by deliberately interrupting rest periods. This would allow them to unilaterally abandon their contractual obligations, which would contradict the principle of *pacta sunt servanda*.<sup>36</sup>

In this respect, a first distinction must be made in such a way that only those activities qualify as “work” in the sense of Working Time Law that are also attributable to the employer. It is argued that activities do not amount to working time if the employee works “voluntarily”.<sup>37</sup> This criterion, however, is, from a practical point of view, not satisfactory. An employee will regularly be driven by a motivation related to the employment relationship – for example to fulfil a burdensome obligation in order to create spare time at

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<sup>35</sup> In this respect, M. Jacobs demands that this leeway is taken use of, M. Jacobs, “Reformbedarf im Arbeitszeitrecht”, *Neue Zeitschrift für Arbeitsrecht*, 2016, 733, 737.

<sup>36</sup> Coming to essentially the same conclusion R. Schlegel, “Grenzenlose Arbeit”, *Neue Zeitschrift für Arbeitsrecht-Beilage*, 2014, 16, 19; C. Frhr. v. Buddenbrock and J. Manhart, “Erreichbarkeit rund um die Uhr?”, *Schnellbrief für Personalmanagement und Arbeitsrecht*, 2014, 93, 94; M. Jacobs, “Reformbedarf im Arbeitszeitrecht”, *Neue Zeitschrift für Arbeitsrecht*, 2016, 733, 735.

<sup>37</sup> Cf. in particular H. G. Wisskirchen and J. P. Schiller, “Aktuelle Problemstellungen im Zusammenhang mit ‘Bring Your Own Device’”, *Der Betrieb*, 2015, 1163, 1167.

a later point in time or to promote his career development.<sup>38</sup> Seeing that employees are driven by an ambiguous blend of intrinsic and extrinsic motives, legally certain attributions based on the distinction between voluntary and involuntary action are hardly possible. Rather, an objective criterion<sup>39</sup> is needed to discern activities initiated by the employer from activities performed independently by employees. It is by all means appropriate to attribute such activities to employers, which constitute a reasonable and proportionate reaction to an employer's conduct. Note that such a conduct could also come in the form of an omission to act on part of an employer. In order to classify an omission as causal, the due care standard of § 130 subs. 1 OWiG (German Federal Law on Misdemeanours) can be applied. If employers do not adequately fulfil their duties to supervise and organise their operation, employees can reasonably feel provoked to work during their spare time – to a reasonable and proportionate extent. Therefore, in both cases, active causation as well as implied toleration of off-duty work, employees' activities must be classified as working time – as long as an activity is attributable. Employers can, however, attain legal certainty if they impose clear rules on the availability of employees during their spare time. In cases where an employer did everything reasonable to prevent employees from working during their spare time and employees nonetheless work without specific inducement, they perform activities that cannot be considered working time because these activities can clearly not be attributed to the employer.<sup>40</sup>

**d) Consequences, in particular with regard to rest periods**

As far as activities cannot be attributed to an employer, these activities do not count against the daily working time in the sense of § 3 ArbZG, Art 6 WTD respectively. Furthermore, they do not interrupt the minimum rest period of eleven hours per day required by § 5 subs. 1 ArbZG and Art 3 WTD.

If an activity can be attributed, protective regulations do apply. Attributable activities count against the daily maximum working time and interrupt compulsory rest periods. Therefore, considering the wording of § 5 subs. 1 ArbZG and Art 3 WTD, demanding an *"uninterrupted"* or *"consecutive"*

<sup>38</sup> R. Falder, "Immer erreichbar – Arbeitszeit- und Urlaubsrecht in Zeiten des technologischen Wandels", *Neue Zeitschrift für Arbeitsrecht*, 2010, 1150, 1151 f.

<sup>39</sup> The concept of *"attribution"* is also considered by M. Jacobs, "Reformbedarf im Arbeitszeitrecht", *Neue Zeitschrift für Arbeitsrecht*, 2016, 733, 735 and R. v. Steinau-Steinrück, "Smartphone versus Arbeitsrecht", *Neue Juristische Wochenschrift-Spezial*, 2012, 178 to assign activities to the category of working time.

<sup>40</sup> Drawing similar conclusions R. Schlegel, "Grenzenlose Arbeit", *Neue Zeitschrift für Arbeitsrecht-Beilage*, 2014, 16, 19; M. Jacobs, "Reformbedarf im Arbeitszeitrecht", *Neue Zeitschrift für Arbeitsrecht*, 2016, 733, 735.

rest period of at least eleven hours, even short-term activities – be it reading an e-mail, answering a customer's query or a phone call – interrupt the rest period with the consequence that it has to be entirely re-granted after the end of the respective activity. In light of this, part of the German-speaking literature proposes that marginal activities should not be considered an interruption of rest periods<sup>41</sup>, with the consequence that an employee could resume his work early in the morning even though he answered a short phone call the evening before. This view is supported in particular by the rationale behind § 5 subs. 1 ArbZG and the WTD, which is to protect employees from health impairments provoked by overexertion and to provide an opportunity to recover.<sup>42</sup> Marginal activities during the evening hours do not seriously jeopardise these aims, so that a convincing argument can be made that rest periods enjoyed before and after a marginal interruption can in fact be added up, with the result of an “*uninterrupted*” rest period of at least eleven hours. It is argued that such an interpretation would not violate the wording of § 5 subs. 1 ArbZG and would merely require a teleological interpretation of the provision.<sup>43</sup>

Considering the detriments to legal certainty, however, such a *de minimis* provision would not be sensible.<sup>44</sup> After all, how to determine whether answering an e-mail is still a minor activity? The declaration as *minor or marginal* crucially depends on whether an employee is faced with tasks that cause stress and endanger the recreational effects of leisure. In this respect, proposals that try to set definite time limits<sup>45</sup> are inadequate to solve the dilemma, since an impairment of recreation does not solely depend on the duration of an interruption.

<sup>41</sup> A. Bissels and I. Meyer-Michaelis, “Arbeiten 4.0 - Arbeitsrechtliche Aspekte einer zeitlich-örtlichen Entgrenzung der Tätigkeit”, *Der Betrieb*, 2015, 2331, 2333; A. Bissels, C. Domke and G. Wisskirchen, “BlackBerry & Co.: Was ist heute Arbeitszeit?”, *Der Betrieb*, 2010, 2052, 2054; G. Thüsing, “Digitalisierung der Arbeitswelt - Impulse zur rechtlichen Bewältigung der Herausforderung gewandelter Arbeitsformen”, *Soziales Recht*, 2016, 87, 98.

<sup>42</sup> V. Vogt, “Einwirkungen von Smartphones auf Arbeitsverhältnisse”, *Steuerberater Woche*, 2012, 765, 767; M. Jacobs, “Reformbedarf im Arbeitszeitrecht”, *Neue Zeitschrift für Arbeitsrecht*, 2016, 733, 737; cf. also recital 2 of the WTD.

<sup>43</sup> Even more radical M. Jacobs, “Reformbedarf im Arbeitszeitrecht”, *Neue Zeitschrift für Arbeitsrecht*, 2016, 733, 737, who argues that minor interruptions usually do not run against the protective purposes of the ArbZG.

<sup>44</sup> R. Krause (fn.1), B 35 und B 42 f; R. Falder, “Immer erreichbar – Arbeitszeit- und Urlaubsrecht in Zeiten des technologischen Wandels”, *Neue Zeitschrift für Arbeitsrecht*, 2010, 1150, 1152 f.; R. Buschmann and J. Ulber (fn. 23), § 2 par. 23.

<sup>45</sup> Cf. R. Krause (Fn. 1), B 46, who proposes a time limit of 15 minutes.

## 2.2. Employees' rights between flexibilisation and health protection

### 2.2.1. The right to unavailability as a fundamental right

The EU Charter of Fundamental Rights grants employees the right to working conditions which respect their health, safety and dignity, Art 31 CFR, in particular the right to a limitation of maximum working hours as well as rest periods (Art 31 subs. 2 CFR). The rights granted by the provision are genuine rights, not mere principles (in the sense of Art 52 subs. 5 no. 2 CFR) used for interpretation.<sup>46</sup> A right to a limitation of working time can also be deduced from the German constitution (Grundgesetz). The right to physical integrity (Art 2 subs. 2 1 GG) and in particular the right to the protection of privacy, which is based on a general right of personality ("Allgemeines Persönlichkeitsrecht", Artt 2 subs. 1, 1 subs. 1 GG), consequently call for a limitation of maximum working hours.<sup>47</sup> The general right of personality also applies in Civil Law matters<sup>48</sup> and obliges employers to exercise their managerial prerogatives considerately.

A legal footing for restrictions to employers' rights provide §§ 241 subs. 2, 315 subs. 1 and 618 BGB. The obligation to consider employees' interests also follows from the protective role of fundamental rights.<sup>49</sup> Fundamental rights do not only limit public authorities from exercising their rights in an excessive manner, but also contracting parties if the protection of another party necessitates so. When a party has unilateral powers, as is undoubtedly the case with respect to employers' managerial rights vis-à-vis employees, a need for protection is indubitably evident. In line with this, the BAG has found that the definite maximum of permissible working time is reached where "*a workload no longer compatible with human capacity*"<sup>50</sup> is required from an employee. However, the protection of personal rights already calls for restrictions below this threshold.

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<sup>46</sup> H. D. Jarass, *Charta der Grundrechte der Europäischen Union – Kommentar*, C.H.Beck, 3<sup>rd</sup> ed. 2016, Art. 31 par. 2.

<sup>47</sup> BT-Drs. 12/5888, 24; U. Baeck and M. Deutsch (fn. 15), § 5 par. 2; R. Anzinger and W. Koberski, *Arbeitszeitgesetz – Kommentar*, dvf Fachmedien Recht und Wirtschaft, 4<sup>th</sup> ed. 2014, Einf. par. 2, § 5 par. 3.

<sup>48</sup> U. Di Fabio in T. Maunz, G. Dürig et al. (eds.), *Grundgesetz – Kommentar*, 81. EL September 2017, Art. 2 GG par. 163.

<sup>49</sup> C.-W. Canaris, "Grundrechte und Privatrecht", *Archiv für die Civilistische Praxis*, 184 (1984), 201, 210 ff; R. Singer, "Tarifvertragliche Normenkontrolle am Maßstab der Grundrechte?", *Zeitschrift für Arbeitsrecht*, 1995, 611, 621; id., "Vertragsfreiheit, Grundrechte und der Schutz des Menschen vor sich selbst.", *JuristenZeitung*, 1995, 1133, 1136 ff; cf. the conflicting German case-law, which in principle only assumes an indirect effect of fundamental rights in private law, BVerfGE 7, 198, 203 ff.

<sup>50</sup> BAGE 38, 69, 81.



The German Federal Constitutional Court (BVerfG) emphasised in its case-law that individuals enjoy a self-determined area of private life into which they can retreat and remain unmolested.<sup>51</sup> On this basis, employees must in principle be granted a "right to unavailability"<sup>52</sup> outside their working hours.<sup>53</sup> An effective protection of employees' privacy requires a fundamental distinction between a work and a private sphere, the latter of which must in principle be shielded against interferences from employers. Limitations to the general right of privacy can only be justified where compelling reasons exist, such as to prevent severe damage or where an activity is imperatively necessary for the performance of contractually owed work.<sup>54</sup> In practice, taking the rights of the works council to codetermine internal regulations on availability outside normal working hours into consideration (§§ 87 no. 2, 3 German Federal Works Constitution Act (BetrVG)), it is advisable to conclude company agreements that limit availability to cases of urgent operational requirements and set a maximum number of days on which workers are required to be available outside of their work hours<sup>55</sup> while also stipulating times in which employees may remain offline. Agreements between employers and employees (in companies without a works council) are subject to a control whether they constitute unfair terms, § 310 subs. 4 2 BGB (see also Art 3 subs. 1 Directive 93/13/EECO). Such clauses must imperatively ensure that employees' health is sufficiently protected. A term that requires employees to be constantly available, is in principle unfair.<sup>56</sup> Insofar as this is necessary for the protection of employees' privacy, the content of company agreements is also subject to control under German Law, § 75 BetrVG.<sup>57</sup> Therefore, the right to privacy must be respected even within such collective agreements.

### 2.2.2. Right to working time flexibility

The ArbZG is constructed in such way that flexible working time arrangements can generally not be achieved. The law, for example, prohibits

<sup>51</sup> BVerfGE 35, 202, 220; 79, 256, 268.

<sup>52</sup> R. Krause (fn. 1), B 32.

<sup>53</sup> Reaching the same conclusion using arguments based on civil law dogmatics R. Krause (fn. 1), B 52 ff.

<sup>54</sup> R. Richardi in R. Richardi, H. Wißmann et al. (eds.), *Münchener Handbuch zum Arbeitsrecht, Band 1 Individualarbeitsrecht*, C.H.Beck, 3<sup>rd</sup> ed. 2009, § 12 par. 40.

<sup>55</sup> Cf. for example the Austrian ArbZG: 10 days a month; cf. also R. Krause (fn. 1), B 46 fn. 200.

<sup>56</sup> For illustrative suggestions that could be used in labour contracts cf. R. Schlegel, "Grenzenlose Arbeit", *Neue Zeitschrift für Arbeitsrecht-Beilage*, 2014, 16, 21 f.

<sup>57</sup> U. Preis in R. Müller-Glöße, U. Preis and I. Schmidt, *Erfurter Kommentar zum Arbeitsrecht*, C.H.Beck, 18<sup>th</sup> ed. 2018, § 310 BGB par. 9; BAG NZA 2001, 462, 464; 2006, 563, 565.

a mutual contractual agreement according to which parents are allowed to leave office early in order to pick up their children from school, to then spend time with them, to afterwards dedicate another two hours to work activities in the evening and to return to their workplace the following morning. Yet, it is precisely this flexibility that those employees who are interested in a healthy work-life balance and who want to reconcile work, leisure and family, call for.

**a) *Mandatory working time law and protection from oneself***

According to the concept of the German ArbZG, working time regulation law is generally mandatory. This follows from an *e contrario* reading of the opening clause of § 7 ArbZG, that allows for derogations in collective and company agreements, as well as the protective purpose of working time norms.<sup>58</sup> This restriction of the freedom of contract, which basically amounts to protecting employees from themselves<sup>59</sup>, exists for good reasons. Due to their structural weakness, employees run the danger, that, under the pressure to enter into an existential employment contract, contractual stipulations attempt to wrest from them the regulatory achievements that ensure reasonable working times and rest periods.

In addition, the protection from self-inflicted harm is in particular justified, where it is doubtful whether the exercise of freedom is the result of a "*free*" decision or where third party or community interests require interventions. Good arguments can be made that employees are not fully capable of estimating the long-term medical consequences of sacrificing rest and recovery.<sup>60</sup> There is also a public interest in maintaining the "*general labour force*"<sup>61</sup>, as sick and overburdened workers will eventually burden social security systems. The duty to wear helmets and to fasten seatbelts when on public roads, for instance, is based on these exact considerations.<sup>62</sup>

**b) *Disproportionality of absolute limitations to private autonomy***

On the other hand, it seems disproportionate to prohibit even rational and balanced arrangements to flexibly allocate working time, or to only allow

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<sup>58</sup> BAG v. 28.10.1971 – 2 AZR 15/71; with further argumentation R. Falder, "Immer erreichbar – Arbeitszeit- und Urlaubsrecht in Zeiten des technologischen Wandels", *Neue Zeitschrift für Arbeitsrecht*, 2010, 1150, 1151 f.

<sup>59</sup> R. Singer, "Tarifvertragliche Normenkontrolle am Maßstab der Grundrechte?", *Zeitschrift für Arbeitsrecht*, 1995, 611, 625 f.; id., "Vertragsfreiheit, Grundrechte und der Schutz des Menschen vor sich selbst.", *JuristenZeitung*, 1995, 1133, 1137.

<sup>60</sup> Cf. as regards the duty to wear helmets and to fasten seatbelts R. Singer, "Vertragsfreiheit, Grundrechte und der Schutz des Menschen vor sich selbst.", *JuristenZeitung*, 1995, 1133, 1140.

<sup>61</sup> R. Anzinger and W. Koberski (fn. 56), Einf. par. 2.

<sup>62</sup> R. Singer, "Vertragsfreiheit, Grundrechte und der Schutz des Menschen vor sich selbst.", *JuristenZeitung*, 1995, 1133, 1140.

derogations where collective agreements allow for them. This would entirely prevent consensual solutions to flexibilise working time and rest periods in companies that are not bound by collective agreements. Both the WTD and – to a lesser extent – the German ArbZG exempt certain groups of employees from the strict working-time regime or allow deviating regulations in collective agreements. This demonstrates that the protection of employees' health does not enjoy absolute precedence. There is no reason why agreements that offer alternative concepts to rigid working hours and rest periods to allow better ways to reconcile work and family life should be prohibited, as long as they guarantee equivalent recreational periods and appreciate the health of employees. The structural weakness of employees does not require a complete negation of the freedom of contract, but only justifies the prevention of inappropriate working conditions. This corresponds with the objective of the control of unfair terms in employment contracts (§§ 310 subs. 3, subs. 4 2 BGB) and the case law of the German Federal Constitutional Court in regard to the protection of self-determination in cases of structural weakness.<sup>63</sup> Contractual stipulations are only invalid as far as they are "*unusually onerous*", meaning obviously inappropriate, for the vulnerable party.

By postulating that employees could not, in any case, waive rights afforded by stipulations of the ArbZG due to the "*protective character of working time norms*"<sup>64</sup>, the BAG shows utter disregard for these strict conditions set out for restrictions to the constitutionally guaranteed principle of private autonomy. There are no compelling reasons why workers who are interested in flexible working hours cannot voluntarily and in agreement with their employer (and possibly the works council) opt for an individual working time model, insofar as their interests – in particular the protection of their health – are taken into due consideration. So-called "*knowledge workers*" who interrupt their work in the afternoon (in order to take care of their children, for example) and resume work in the evening have already enjoyed part of their mandatory rest period.<sup>65</sup> That these employees need another – "*uninterrupted*" – rest period of eleven hours is not necessarily the fact, if, in total, the mandatory rest period is granted and overexertion is ruled out.

<sup>63</sup> BVerfGE 81, 242 (255 f. – commercial agent), 89,214 (232 – guarantee), BVerfGE 103, 89, 111 and BVerfG NJW 2001, 2248 (both regarding a waiver of alimony); cf. also R. Singer, "Das Sozialmodell des Bürgerlichen Gesetzbuchs im Wandel", in S. Grundmann, M. Klopfer et al. (eds.), *Festschrift 200 Jahre Juristische Fakultät der Humboldt-Universität zu Berlin*, De Gruyter, 2012, 981, 994 f.

<sup>64</sup> BAG v. 28.10.1971 – 2 AZR 15/71 (par. 17).

<sup>65</sup> A. Bissels and I. Meyer-Michaelis, "Arbeiten 4.0 - Arbeitsrechtliche Aspekte einer zeitlich-örtlichen Entgrenzung der Tätigkeit", *Der Betrieb*, 2015, 2331, 2333.

These considerations regarding the proportionality of restrictions of private autonomy, cannot only be based on German constitutional law but also and analogously on European Law. The restrictions to the freedom of occupation entailed by the WTD must be measured against the guarantee of Art 15 CFR. That is, whether they are justified by overriding reasons relating to public interest and, in particular, whether they are capable to attain the objectives pursued by them while also not going beyond what is necessary to achieve these objectives.<sup>66</sup> Although the restriction on the maximum working time and the guarantee of a consecutive rest period is generally adequate to ensure the intended protection of workers' health, the measures go beyond the objective if workers are deprived of adequately flexible working time models.

### 2.3. Deliberations on necessary reforms

#### 2.3.1. Re-thinking the "rest period"

A general reduction of the rest period or piecing together a rest period over a reference period<sup>67</sup> is prohibited.<sup>68</sup> Under the current WTD, national legislators are also barred from introducing a de minimis rule, under which marginal activities would not interrupt a rest period.<sup>69</sup> The wording of Art 3 WTD, which requires a "*consecutive*" rest period, offers no room for interpretation. It is also unlikely that the legal framework set by the EU will change in the foreseeable future. Over the past 15 years, all reform efforts have failed, leaving little room for hope that the European legislator will take action.<sup>70</sup>

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<sup>66</sup> CJEU [1995] ECR I-4165 (*Gebhard*).

<sup>67</sup> Apparently demanded by A. Bissels and I. Meyer-Michaelis, "Arbeiten 4.0 - Arbeitsrechtliche Aspekte einer zeitlich-örtlichen Entgrenzung der Tätigkeit", *Der Betrieb*, 2015, 2331, 2333.

<sup>68</sup> R. Krause (fn. 1), B 47; W. Kohte, "Arbeitsschutz in der digitalen Arbeitswelt", *Neue Zeitschrift für Arbeitsrecht*, 2015, 1417, 1423.

<sup>69</sup> R. Krause (fn. 1), B 46 f.

<sup>70</sup> M. Jacobs, "Reformbedarf im Arbeitszeitrecht", *Neue Zeitschrift für Arbeitsrecht*, 2016, 733, 734; this is also the consensus among German Labour Law scholars, cf. R. Wank, "Neues in Arbeitszeitrecht und Arbeitsschutzrecht? – Bericht vom 2. Deutschen Arbeitsrechtstag", *Recht der Arbeit*, 2016, 172; at this point it should not be glossed over the fact that the latest reform efforts by EU bodies resulted in an "interpretive" communication of the European Commission (<http://ec.europa.eu/social/BlobServlet?docId=13085&langId=en> [accessed 23 March 2018]), which essentially summarises CJEU case-law on the WTD since 1993.

### 2.3.2. Specific provisions only applying to certain groups of employees

The German legislator has not yet made full use of the opening clause of Art 17 WTD which allows derogations on account of the specific characteristics of the activity concerned. So-called “*executive employees*”, however, are exempted from the application of the ArbZG, § 18 subs. 1 no. 1 ArbZG. But due to the reference to § 5 subs. 3 BetrVG, the protective purpose of which is entirely different from the purposes pursued by Working Time Law, and the narrow interpretation of the BAG of said provision, the exemption falls short of the regulatory freedoms afforded by the WTD.<sup>71</sup> The problem of en masse violations of mandatory rest periods concerns predominantly employees with independent decision-making power, that is to say not only those who are considered “*executive employees*” by the ArbZG. If these were excluded from the scope of the ArbZG, a significant proportion of activities performed outside of normal working hours could be legalised, eliminating the current legal grey area.

Art 17 subs. 1 WTD even allows for further derogations beyond these groups of employees. While it is true that the CJEU adopted a very narrow interpretation of the provision, demanding that an employee’s working time *as a whole* cannot be measured, predefined or determined by the employee<sup>72</sup>, a systematic analysis of the wording of Art 17 subs. 1 WTD (“*particularly*”) shows that employees, who do not have independent decision-making powers, but whose working hours are also not measured, can, as a matter of fact, be exempted from protective regulations of the WTD. In view of the reservation clause that requires to take due regard for the general principles of the protection of the safety and health of workers, such an interpretation is virtually compelling. Art 17 subs. 1 WTD grants wide discretion to introduce manifold, also selective, derogations from otherwise mandatory protective regulations. Completely depriving employees who work below the management level of the protection afforded by § 5 subs. 1 ArbZG would, however, undoubtedly reach too far. Moderate and narrowly defined<sup>73</sup> liberalisations on the other hand are certainly possible – especially when taking the best interests of employees into consideration.

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<sup>71</sup> M. Henssler and S. Lunk, “Leitende Angestellte und das Arbeitszeitrecht – Betrachtungen de lege lata und de lege ferenda”, *Neue Zeitschrift für Arbeitsrecht*, 2016, 1425, 1427 f.

<sup>72</sup> Case C-484/04 ECR I-7492 (Commission/United Kingdom), par. 20.

<sup>73</sup> Prerequisites could be the requirement of an explicit opt-in by the employee combined with a right to withdraw without any sanctions at any time, mandatory compensation periods and an employer's duty to keep up-to-date records similar to the provision of Art 22 subs. 1 lit. d) & e) WTD.

### 2.3.3. Flexibility based on collective agreements

Even when maintaining, without exception, the mandatory nature of working time law, the legislator should exhaust the framework that the WTD provides as regards arrangements in collective agreements. After all, there is a consensus that there is a principle demand of employees to organise time and place of their work activities more flexible.<sup>74</sup> Although the German Federal Ministry of Labour and Social Affairs (BMAS) does not see a need to adapt the legal framework, it nevertheless points to the opportunity to offer flexible working conditions through company and collective agreements.<sup>75</sup> However, in view of the limited options for divergent collective bargaining arrangements offered by the ArbZG when compared to Art 18 WTD, the German legal framework appears to be insufficient to ensure a sensible degree of flexibility. The possibility afforded by § 7 ArbZG to shorten rest periods does in principle offer an opportunity to meet employees' desires for more flexible working hours.<sup>76</sup> But even a rest period that has been shortened to nine hours poses challenges to young families. Therefore, the German legislator should make further use of the opening clause of Art 18 WTD that allows for wider derogations in collective agreements than currently found in § 7 ArbZG. One could, for example, – as Krause suggested in his expert opinion for the 71st German Lawyers' Forum (Deutscher Juristentag) – revamp § 7 subs. 1 no. 3 ArbZG which currently requires that the *"nature of the work conducted"* demands a reduction of the rest period.<sup>77</sup> A reduction of the rest period by up to two hours could for example also be allowed *"at the request of the worker"*. The proposal – that is also supported by the BMAS – to allow collective agreements which stipulate that minor interruptions do not lead to a new start of a rest period, but only reduce it from eleven to nine hours, should also be followed through. This would at least legalise activities immediately before and after core working times.<sup>78</sup> Art 18 WTD is also open to flexible working time

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<sup>74</sup> Cf. inter alia BMAS (fn.7), 119 ff.; R. Krause (fn. 1), B 81 ff.; G. Thüsing, "Digitalisierung der Arbeitswelt - Impulse zur rechtlichen Bewältigung der Herausforderung gewandelter Arbeitsformen", *Soziales Recht*, 2016, 87, 101; H. Luthge, "Arbeiten 4.0: Arbeitszeitgesetz auf dem Prüfstand", *Schnellbrief für Personalmanagement und Arbeitsrecht*, 2017, 41; djb Kommission für Arbeits-, Gleichstellungs- und Wirtschaftsrecht, "Konzept für ein Wahlarbeitsgesetz", *Zeitschrift des Deutschen Juristinnenbundes*, 2015, 121; cf. also p. 9 of the policy paper of the SPD (Social Democratic Party of Germany) parliamentary group, [http://www.spdfraktion.de/system/files/documents/2016-2-23\\_arbeiten\\_4\\_0\\_positionspapier\\_spd-bundestagsfraktion.pdf](http://www.spdfraktion.de/system/files/documents/2016-2-23_arbeiten_4_0_positionspapier_spd-bundestagsfraktion.pdf), in German [accessed 23 March 2018].

<sup>75</sup> BMAS (fn.7), 119.

<sup>76</sup> BMAS (fn.7), 121; reaching the same conclusion R. Krause (fn. 1), B 45.

<sup>77</sup> R. Krause (fn. 1), B 45.

<sup>78</sup> R. Krause (fn. 1), B 46.

models that ensure an adequate protection of employees and are agreed upon by the social partners.

### **3. Key findings**

1. Times of constant availability can be assigned to the category of stand-by duty and are thus generally to be considered rest periods, which begin anew after each interruption. However, rest periods are only interrupted if an employee's activity is attributable to the employer. That is the case if an employee could, taking the overall circumstances of the contractually owed work into consideration, reasonably feel provoked to work.
2. Derogating from provisions of the ArbZG to the effect that rest periods do not have to be granted "uninterruptedly", is, in light of the current European framework, only possible if this is provided for in collective agreements. Greater flexibility can only be achieved if the German legislator makes use of the opening clause of Art 18 WTD and extends the opportunities of the social partners.
3. Employees have a "right to unavailability" outside their regular working hours. In the interest of balancing the interests of both employees and employers, statutory or collective regulations should be imposed that set clear limits to availability.
4. The protection of health pursued by Working Time Law is in conflict with workers' widespread desire for flexible working conditions.
5. Flexible working time models come into conflict with the mandatory nature of Working Time Law. However, the protection from oneself only requires a prohibition of inappropriate contractual conditions. Further restrictions are disproportionate.
6. The mandatory nature of rigid working time legislation should not inhibit working time models that promote the reconciliation of family, leisure and work and at the same time do not jeopardise employees' health and safety. Art 17 subs. 1 WTD provides room for derogations from otherwise mandatory working time provisions, which has not been adequately used by the German legislator.





## **The re-configuration of working time in times of crisis: legislation and collective agreements**

Tania Bazzani

### **Abstract**

By drawing links between the subject of working time, on one hand, and the role of both collective bargaining and public short-term work schemes (public STW schemes), on the other, this contribution seeks to analyse the development of working time in the EU from a comparative perspective (Italy, Denmark and Spain), considering both EU law and domestic legislation and collective bargaining trends in this field. In doing this, this contribution highlights three objectives of working time: workers' health and safety protection for workers; employers' and employees' flexibility, including work-life balance; working time as a way to deal with unemployment.

### **1. Introduction**

This contribution seeks to analyse the development of working time in the EU from a comparative perspective (Italy, Denmark and Spain), considering both EU law and domestic legislation and collective bargaining trends in this field. In particular, within the context of the current economic crisis (notwithstanding differences between Member States), this paper will draw links between the subject of working time, on one hand, and the role of both collective bargaining and public short-term work schemes (public STW schemes), on the other.<sup>1</sup>

This study will take into account both EU and domestic regulation, from a comparative perspective, by focussing on the Italian system and discussing two relevant examples worthy of comparative analysis: the Danish system, which has showed its capacity to deal with the economic crisis through, among other things, a re-configuration of working time, and the Spanish system, which has one of the highest unemployment rates in the EU and, consequently, is in great need of reform. Relevant aspects of the Spanish and

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<sup>1</sup> European Commission, Short time working arrangements as response to cyclical fluctuation, European Economy, Occasional papers, June 2010, n. 64, 18. Such schemes cover "benefits compensating for the loss of wage or salary due to formal short-time working arrangements, and/or intermittent work schedules, irrespective of their cause, and where the employer/employee relationship continues": definition covering sub-category 8.2 of the Eurostat LMP database.

Danish systems will be analysed in order to point out the main similarities to, and differences from, the Italian system.<sup>2</sup>

When it comes to working time, three features or objectives should be highlighted at the outset: (i) working time as a way to ensure health and safety protection for workers; (ii) working time as a way to ensure a better level of flexibility in favour of both employers and employees; (iii) working time as a way to deal with unemployment. These three aspects have interacted over the years, and have influenced the European and domestic debates on working time. At the same time, each of these aspects have been influenced differently by the crisis.

## 2. EU Law and working time

At the end of the 1980s, “reduction of working-time and greater flexibility of working-time” could be considered “two poles around which the political debate” was “taking shape.”<sup>3</sup>

This debate led to the adoption of Directive 93/104/EC in 1993, which aimed at laying down “minimum health and safety requirements of the organization of working time.”<sup>4</sup> This Directive was based on the legal framework offered by Article 137.2 TEC<sup>5</sup>, according to which it was adopted by the Council of the European Union, in cooperation with the European Parliament, to regulate certain aspects of the organization of working time.

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<sup>2</sup> The paper follows a *functional* comparative approach. See A. Peters, H. Schwenke, “Comparative Law Beyond Post-Modernism”, *International and Comparative Law Quarterly*, Vol. 49, Is. 4, 2000, p. 800-834.

<sup>3</sup> C. Purkiss, E. Verborgh, “Preface”, in R. Blanpain, E. Köhler (eds.), *Legal and Contractual Limitations to Working-Time in the European Community Member States*, European Foundation for the Improvement of Living and Working Conditions, Kluwer Law and Taxation Publishers, 1988.

<sup>4</sup> The original Treaty of Rome did not recognise to the European authorities specific powers to intervene in the working time issue. But a general goal to promote close co-operation in employment and working conditions between Member States was set by article 118, then by article 140 TEC and today by article 156 of the consolidated version of the TFEU. Moreover, art. 120 indicated that Member States “shall endeavour to maintain the existing equivalence between paid holiday schemes”, (then, article 142 TEC, and today, article 158 of the consolidated version of the TFEU).

<sup>5</sup> Art. 137.1. TEC. With a view to achieving the objectives of Article 136, the Community shall support and complement the activities of the Member States in the following fields: ...working conditions...

Art. 137.2. To this end, the Council may adopt, by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each Treaty establishing the European Community.

In essence, the Directive introduced minimum requirements with respect to daily rest (11 consecutive hours per 24-hour period), minimum breaks (per every 6 hours of work), a weekly rest period (a minimum uninterrupted rest period of 24 hours, plus the aforementioned 11 hours' daily rest), maximum weekly working time (48 hours, as an "average working time"), annual leave (paid annual leave of at least four weeks), night and shift work, and patterns of work. It also provided some definitions, such as that of "working time", which it defined as "any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice."<sup>6</sup>

This definition of working time is "considered to be an autonomous concept of European Union law, meaning that MSs are not allowed to apply any other definition of working time in their legislation (see e.g. ECJ, Jaeger, 9 September 2003, C-151/02)."<sup>7</sup> Over the years, the Court of Justice has affirmed this definition.<sup>8</sup>

With regard to ways to regulate working hours, some scholars have pointed out that "protective legislation in the traditional sense sets minimum standards, while the main source of implementation of, and regulation in addition to, these standards is collective bargaining at various levels (national, inter-industry, industry wide and enterprise-wide)."<sup>9</sup>

Indeed, the Directive – which sets minimum standards – is supposed to facilitate or permit the application of collective agreements made by social partners to improve protection; at the same time, it is not supposed to affect Member States' right to apply, or introduce, a regulation more favourable to the protection of the health and safety of workers.

The minimum requirements may also be improved upon by law and/or collective agreements in cases, and under the conditions, prescribed by the directives (e.g. for specific characteristics of activity, in case of imminent risk, etc.).

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<sup>6</sup> Directive 93/104/EC, Art. 2.

<sup>7</sup> C. Lang, S. Clauwaert, I. Schömann, "Working Time Reforms in Times of Crisis", *ETUI Working Paper*, No. 4, 2013, p. 6.

<sup>8</sup> On the "working time" definition the Court of Justice has progressively specified some elements: Judgment of the Court of Justice in Case C-303/98, *Sindicato de Médicos de Asistencia Pública (Simap) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana*: The Court has given a ruling on the application to medical staff assigned to primary health care teams of certain aspects of the Directive 93/104/EC. See also *Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* (2005) C-397/01-403/01; *Personalrat der Feuerwehr Hamburg v Leiter der Feuerwehr Hamburg* Case C-52/04; *Nicole Wippel v Peek & Cloppenburg GmbH & Co. KG*, C-313/02; etc.

<sup>9</sup> R. Blanpain, "General Report", in R. Blanpain, E. Köhler (eds.), *Legal and Contractual Limitations to Working-Time in the European Community Member States*, European Foundation for the Improvement of Living and Working Conditions, Kluwer Law and Taxation Publishers, 1988, p. 20.

With regard to weekly working time, it must be understood as the average working hours over the course of a reference period of 4 months. This period can be extended to up to 6 months. Moreover, Member States can allow collective agreements or agreements concluded between the two sides of industry to set reference periods of no greater than 12 months “for objective or technical reasons or reasons concerning the organization of work”.<sup>10</sup>

The minimum standards set by the Directive are regulated by statute all over the EU, apart from Denmark, “where collective bargaining provides a functional equivalent”, and Britain.<sup>11</sup>

As mentioned, Directive 93/104/EC was adopted to cope with the need to strengthen the workers’ protection of health and safety within the working relationship: indeed, both an excessive working time duration and specific ways to carry out the job, such as night and shift work, can affect workers’ health and safety.

In those years in which the Directive was adopted, trade unions agitated for a reduction of working time for reasons going beyond questions of health and safety. Indeed, a reduction in working time could serve to redistribute available work, thus promoting employment.

Three years after the adoption of Directive 93/104/EC, in 1996, the European Parliament adopted a Resolution inviting Member States to reduce working time. The Resolution was based on a survey, the outcomes of which showed that European workers were willing to work fewer hours, even if this could imply a salary reduction.<sup>12</sup> This could also be understood to be an indication that workers value an effective work-life balance.

The survey highlighted the relationship between reducing working time and increasing work productivity. At the same time, the Socialist Group in the European Parliament supported a proposal seeking recognition of the benefits of reducing working time to below 40 hours per week, taking inspiration from a project promoted by the French Socialist Party.<sup>13</sup> This trend influenced the policy of several Member States toward a reduction in weekly working hours.

While trade unions supported this, companies lobbied for more flexible working time, a goal that had partially already been reached through the

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<sup>10</sup> Directive 93/104/EC.

<sup>11</sup> H. Compston, “Social partnership, welfare state regimes and working time in Europe”, in B. Ebbinghaus, P. Manow (eds.), *Comparing Welfare Capitalism. Social policy and political economy in Europe, Japan and the USA*, Routledge, London, 2001, p. 130.

<sup>12</sup> D. Anxo (eds.), *Working time: Research and development, 1995 – 1997*, A review of literature (1995-1997) commissioned by the European Commission and the European Foundation for the Improvement of Living and Working Conditions, European Commission - Employment and social affairs, 1998.

<sup>13</sup> P. Ichino, L. Valente, “L’orario di lavoro e i riposi”, Artt. 2107-2019, *Il Codice Civile, Commentario Schlesinger*, Giuffrè Ed., 2012, p. 13-16.

introduction of “average working time” (Directive 93/104/EC), which provides – as abovementioned - that maximum working hours must be calculated within a period of 4, 6 or 12 months; due to the long time period over which averaging calculations are made, the potential exists for periods in which work is much more highly concentrated. Moreover, a wide scope of circumstances in which the legislation in the field may be waived has also contributed to increase flexibility.

For some scholars, working hours flexibility may be considered to be an opportunity not exclusively for companies, but also for workers, to support individual autonomy. According to this position, individuals should have the ability to adapt working time to their needs, toward a sort of *individualisation* of working hours. Such *individualisation* was supposed to have been “the outcome of new ways of managing working time.”<sup>14</sup> Yet providing this increased scope may have also run the risk of frustrating the protection goal introduced by legislation, recognising excessive possibilities to waive the rules.<sup>15</sup>

Within the wider concept of individualization, in the 1990s and early 2000s, the goal of achieving a balance between work and personal life began to be considered to be of crucial interest in the working time debate.

At the end of the 1990s, the Council highlighted the need to modernise those guidelines relating to working hours that had been contained in the original European Employment Guidelines. This was to be carried out by means of both law and collective bargaining, and to be achieved through “flexible working arrangements... achieving the required balance between flexibility and security”<sup>16</sup> and “the adaptation of employment legislation, reviewing where necessary the different contractual and working time arrangements.”<sup>17</sup>

Further, according to the EU guidelines, working time was not seen merely in relation to companies’ flexibility, but also as a way to increase investment

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<sup>14</sup> A. Supiot, M. E. Casas, J. De Munck, P. Hanau, A. Johanson, P. Meadows, E. Mingione, R. Salais and P. van der Heijden, *Transformation of Labour and Future of Labour Law in Europe - Final Report for the European Commission*, June 1998, p. 269: “Surveys confirm growing individualisation of working time and a substantial reduction in the proportion of employees who have the same pattern every day or work the same number of days every week”, 269. See also A. Supiot : “Temps de travail: pour une concordance des temps”, *Droit Social*, 1995, p. 145-154: English version as “On-the-Job Time: Time for Agreement”, *The International Journal of Comparative Labour Law and Industrial Relations*, Vol. 12, No. 3, 1996, p. 195-212; Italian version as “Alla ricerca della concordanza dei tempi (le disavventure europee del "tempo di lavoro")”, *Lavoro e diritto*, Vol. 1, 1997, p. 15-34.

<sup>15</sup> P. Ichino, L. Valente, “L’orario di lavoro”. See also M. Roccella, D. Izzi, *Lavoro e diritto nell’unione europea*, Cedam, 2010, p. 145.

<sup>16</sup> Council Decision of 19 January 2001 on Guidelines for Member States’ employment policies for the year 2001.

<sup>17</sup> Council Decisions of 12 July 2005 on guidelines for the employment policies of the Member States (2005/600/EC).

in human capital through better education and skills. This was to be made possible by “easing and diversifying access for all to education and training and to knowledge by means of working time organisation, family support services, vocational guidance and, if appropriate, new forms of cost sharing.”<sup>18</sup>

In 2003, the Directive 2003/88/EC systematized the previous regulation and abrogated the Directives 93/104/EC and 2000/34/EC (the latter of which concerned certain aspects of the organisation of working time to cover sectors and activities excluded from the 1993 Directive).

#### **a) Recent trends**

In recent years, at least up until the crisis, the working time debate has started to change. Trade unions, supporting working time reduction, have increasingly seen their power eroded, while employers “have been pushing for working time extensions without offering compensation. Working time statistics show indeed that the trend of previous years toward working time reduction has been reversed in a number of European Countries.”<sup>19</sup>

In the three countries under analysis, collective bargaining has been crucial for regulating working time, yet, at the same time, industrial relations have been characterized by increasing tensions in recent years.<sup>20</sup>

Thus, whereas in the initial phase trade unions highlighted the reduction of working time as a primary concern, they then had to defend “the achievements of previous years”, and the “working time issue has become a major source of disagreement and conflict”<sup>21</sup>.

The economic recession, which started at the end of 2008, produced a considerable reduction in available work, especially in the manufacturing sector. This lack of work increased employers’ need for flexible measures in order to be competitive. Companies also needed to avoid losing workers with professional experience, and to be ready for any possible economic upturn. At the same time, workers needed to keep their work, or at least to be supported by benefits until they could re-enter the LM.<sup>22</sup>

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<sup>18</sup> Council Decisions of 12 July 2005 on guidelines for the employment policies of the Member States (2005/600/EC).

<sup>19</sup> M. Keune, “Collective bargaining and working time in Europe: An overview”, in M. Keune and B. Galgóczi, (eds.), *Collective bargaining on working time: Recent European experiences*, Brussels, European Trade Union Institute ETUI, 2006, p. 9; see also M. Weiss, “Job Security: a Challenge for EU Social Policy”, in N. Countouris, M. Freedland, *Resocialising Europe in a Time of Crisis*, Cambridge Un. Press, 2013, p. 278 ff.

<sup>20</sup> M. Keune, “Collective bargaining and working time”, p. 18.

<sup>21</sup> M. Keune, “Collective bargaining and working time”, p. 9.

<sup>22</sup> S. Spattini, “Il funzionamento degli ammortizzatori sociali in tempo di crisi: un confronto comparato”, *Diritto relazioni industriali*, Vol. 3, 2012, p. 670 ff. By adopting flexible measures employers can also avoid to face dismissal costs.

The increased flexibility called for by companies, and thus working time deregulation, was bolstered by a proposal to revise the Directive, which also included an explicit 60-hour weekly limit.<sup>23</sup> In December 2011, after two stages of consultation in March 2010 and December 2010, the cross-industry social partners at the EU level began negotiations on a review of the Working Time Directive, which ended without an agreement in December 2012.<sup>24</sup>

As Lang, Clauwaert and Schömann put it, “in December 2012, negotiations between the social partners stalled when the Executive Committee of the ETUC noted that the “final offer” from the employers was not sufficiently balanced<sup>25</sup>”, but rather aimed only to reduce costs and achieve greater flexibility.

The weakening of trade unions, the insistent call for flexibility by companies, the lack of an agreement to revise the directive, the economic crisis and the high unemployment rate across the EU have led to an increase in collective bargaining aimed at activating the possibilities for flexibilization provided by the directive. At the same time, flexibilization has also been achieved through unilateral decision-making and, in some cases, even by working time reduction supported by public finances through STW schemes.

In particular, according to 2014 ILO research on “the use of working time-related crisis response measures during the Great Recession”, there have been two primary ways to introduce working-time flexibility requested during the crisis: (i) work-sharing schemes, with specific domestic characteristics and public subsidies; and (ii) “working-time adjustments based on unilateral or bilateral decisions taken at the level of the firm, with or without a framework of collective agreements, but in either case without public financial support.”<sup>26</sup>

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<sup>23</sup> Eurofound Research, *Revisions to the European working time directive: recent Eurofound research*, Background paper, 2008. See also D. Gottardi, F. Guarriello (eds.), M. Roccella, *Manuale di Diritto del Lavoro*, Giappichelli Ed., 2015, p. 329. See also F. Vandenbroucke, C. Barnard, G. De Baerem A European Social Union after the Crisis, Cambridge University Press, 2017.

<sup>24</sup> Directorate-General for Employment, Social Affairs and Inclusion, *Industrial Relations in Europe* 2012, 2013, <http://ec.europa.eu/social/main.jsp?catId=738&langId=it&pubId=7498&type=2&furtherPubs=yes>

<sup>25</sup> C. Lang, S. Clauwaert, I. Schömann, “Working Time Reforms”, p. 6.

<sup>26</sup> A. Kümmerling, S. Lehdorff, “The use of working time-related crisis response measures during the Great Recession”, *Conditions of work and employment series*, Vol. 44, 2014, International Labour Organization. The research points out the lack of information especially with regard to the second type of measures, and also with regard to the small and medium enterprises (SMEs), p. 7, 8.

With regard to the flexibilization of working time in the absence of STW access, even in these times of trade unions' declining influence, the 2015 ILO Report on "Labour Protection in a Transforming World of Work" highlighted the idea of flexibilization of working time in favour of workers, and not just of companies. In particular, referring to Golden<sup>27</sup>, the report affirms that "flexible working is a variation of an employee's normal working pattern, and includes part-time work, flexitime, job-sharing, and working from home (telework). Innovative working-time arrangements such as flexitime and compressed workweeks, if properly structured, can be mutually advantageous for both workers and enterprises."<sup>28</sup> At the same time, because of fluctuations in the market, new forms of contract, without any fixed working time, have been increased across EU countries, increasing the levels of precariousness for workers.<sup>29</sup> Such developments cannot be considered a good basis for achieving a healthy work-life balance.

In this regard, the impact of telework/ICT-mobile work (T/ICTM) on the world of work has recently been taken into consideration by a study carried out by the Eurofound that also concerned its effects on working time, performance, work-life balance, and health and well-being. The study notes that "implementing flexible working time arrangements relate..." also "...to the improvement of working conditions – more specifically, ways in which workers can reconcile work and personal life."<sup>30</sup>

#### ***b) Public short-time working schemes (public STW schemes)***

Since the 1990s, the EU has emphasised the need for Member States to guarantee their financial sustainability.<sup>31</sup> In the context of the current economic crisis, public expenditure for STW schemes and unemployment benefits have increased considerably, putting under intense pressure the Member States' public finance. EU Institutions have continued to stress the need to reduce public debt and social systems costs.<sup>32</sup>

<sup>27</sup> L. Golden, "The Effects of Working Time on Productivity and Firm Performance: A Research Synthesis Paper", ILO, *Conditions of Work and Employment Series*, No. 33, 2012.

<sup>28</sup> ILO, "Report VI. Labour protection in a transforming world of work. A recurrent discussion on the strategic objective of social protection (labour protection)," International Labour Conference, 104<sup>th</sup> Session, 2015, p. 34: [http://www.ilo.org/wcmsp5/groups/public/@ed\\_norm/@relconf/documents/meetingdocument/wcms\\_358295.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_358295.pdf)

<sup>29</sup> ILO, "Report VI", p. 34.

<sup>30</sup> ILO, "Report VI", p. 10.

<sup>31</sup> Modernising and Improving Social Protection in Europe, COM (97) 102 final, 12.03.1997; Extraordinary European Council Meeting on Employment, Luxembourg, 20 and 21 November 1997 Presidency Conclusions; Council Resolution of 22 February 1999 on the 1999 Employment Guidelines, A Concerted Strategy for Modernising Social Protection, COM (99) 347 final, 14.07.1999.

<sup>32</sup> See the EU Recommendations to Member States since 2011:



The aforementioned 2014 ILO<sup>33</sup> research noted that, during the crisis, companies adopted measures that they were already familiar with and that they had already theretofore been applying, i.e. over the previous ten or twenty years. At the same time, since the beginning of the economic recession, the eastern European Member States have, for the first time, adopted legislative measures to reduce working time.<sup>34</sup>

But this trend can be considered common in the OECD countries, too. In particular, research shows that, from the beginning of the crisis, STW has been employed in respect over 4.5 million workers across the OECD, albeit with considerable differences from one country to another.<sup>35</sup>

Moreover, the context of this increase in STW – meaning lower wages for workers and increasing public expenditure – has been characterized by a complex picture; as was highlighted by Lang, Clauwaert and Schömann, “on the ground of responding to the economic crisis, labour law reforms have been adopted in various EU Member States in recent years”, downsizing labour law standards in order to introduce greater LM flexibility.<sup>36</sup>

STWs have been applied during the crisis in order to reduce working time, and thus to support companies when their customers cut their orders. In this way, companies could keep their workforce and be ready to respond to the economic recovery. In particular, “these arrangements allow companies to preserve human capital and skills that will be necessary in the recovery phase. Further, employers reduce potential costs related to personnel turnover, dismissal, recruitment process, and training”.<sup>37</sup> At the same time, the reduction of working hours has been financed through public support in the different Member States. This enabled workers to retain their position and save a part of their wage, even for the hours they didn’t work.

STW are also valuable in that they “maintain social peace and cohesion in that employers and employees share the impact of the downturn”<sup>38</sup> and can

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[http://ec.europa.eu/europe2020/documents/documents-and-reports/subject/monitoring-progress/index\\_it.htm](http://ec.europa.eu/europe2020/documents/documents-and-reports/subject/monitoring-progress/index_it.htm)

<sup>33</sup> A. Kümmerling, S. Lehnndorff, “The use of working time-related crisis”, p. 4.

<sup>34</sup> V. Glassner, M. Keune, P. Marginson, “La contrattazione collettiva in tempo di crisi”, *Diritto relazioni industriali*, Vol. 2, 2012, 296 ff.

<sup>35</sup> A. Hijzen, S. Martin, “The Role of Short-Time Work Schemes during the Global Financial Crisis and Early Recovery: A Cross-Country related Analysis”, OECD Social, Employment and Migration Working Papers, No. 144, 2012, p. 6.

<sup>36</sup> C. Lang, S. Clauwaert, I. Schömann, “Working Time Reforms”, p. 5.

<sup>37</sup> M. Tiraboschi, “Labor Market Policies to Tackle the Crisis and Sustain the Economic Growth in EU: Models and Solutions”, in *Lera 63rd Annual Proceedings*, 2011: <http://www.bollettinoadapt.it/old/files/document/14077TiraboschiProcee.pdf>, p. 22 ff., in particular p. 33.

<sup>38</sup> M. Tiraboschi, “Anti-crisis Labour Market Measures and their Effectiveness between Flexibility and Security”, in M. Tiraboschi, *Labour Law and Industrial Relations in Recessionary Times The Italian Labour Relations in a Global Economy*, Adapt University Press, Adapt Labour Studies e-Book series n. 3, 2012:, p. 22 ff., in particular p. 32.

work as a “flexible tool for governments that are able to somehow control the adjustment of the labour market”.<sup>39</sup> Scholars highlighted the fact that such positive outcomes corresponded to improving the macroeconomic situation of Member States and of the EU as a whole because the use of STW schemes functioned as an automatic stabiliser.<sup>40</sup> But researchers also pointed out that: (i) such an outcome was achieved only if companies accessed STW when they actually needed to; however, in the case of companies accessing STW without being in need of it, this could affect the system in a negative way, and could correspond to a reduction in productivity of the system at the macroeconomic level; (ii) the “discretionary” component of the STW, i.e. the prerequisites to access to such schemes, play a crucial role in the STW’s effectiveness from a macroeconomic perspective: the more accessible they are, the less effective the STW scheme is in reducing the unemployment rate.<sup>41</sup> In this last respect, Brey and Hertweck recently estimated that where access to STW schemes has been lower, the positive impact of such schemes on the unemployment rate has been more significant: by way of illustration, the “peak uptake rate” in Denmark was 0.48, whilst the success ratio stood at 151%; peak uptake in Spain was 0.79, with a success ratio of 137%; and peak uptake in Italy was 2.49 with a success ratio of 87%.<sup>42</sup>

Thus, it is important to highlight that STW schemes can be useful, but only to the point at which they cease to be needed; beyond this point, companies should be able to deal with the effects of the crisis using own resources.

However, as Brey and Hertweck note, according to Boeri and Brecker, there has been “a sizable amount of deadweight loss during the Great Recession,”<sup>43</sup> i.e. a loss of economic efficiency. Thus, on the one hand, the use of STW schemes helped to preserve jobs and supported workers during the crisis. On the other hand, continuing to use such schemes could have slowed the recovery in terms of quality and quantity of jobs.<sup>44</sup>

At the same time, in 2012, Clauwaert and Schömann<sup>45</sup> highlighted that Member States had adopted a number of reforms, which introduced changes

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<sup>39</sup> M. Tiraboschi, “Anti-crisis”, p. 28.

<sup>40</sup> A. Balleer, B. Gehrke, W. Lechthaler, C. Merkl, “Does short-time work save jobs? A business cycle analysis”, IZA DP, No. 7475, 2013.

<sup>41</sup> A. Hijzen, S. Martin, “The Role of Short-Time Work Schemes”.

<sup>42</sup> B. Brey, M. S. Hertweck, “The Extension of Short-Time Work Schemes during the Great Recession: A Story of Success?”, *Working Paper Series – University of Konstanz – Department of Economics*, No. 5, 2016, p. 21.

<sup>43</sup> B. Brey, M. S. Hertweck, “The Extension of Short-Time Work Schemes”, p. 1. See: T. Boeri, H. Bruecker, “Short-time work benefits revisited: Some lessons from the Great Recession”, *Economic Policy*, Vol. 26, Iss. 68, 2011, pp. 697–765.

<sup>44</sup> A. Hijzen, S. Martin, “The Role of Short-Time Work Schemes”.

<sup>45</sup> S. Clauwaert, I. Schömann, “The Crisis and National Labour Law Reforms: a Mapping exercise”, ETUI Working Paper N. 4, 2012.

in labour law, including in working time, “using the crisis as an excuse”.<sup>46</sup> Thus, for some scholars, the expansion of STW schemes “primarily benefited large firms using short-time work recurrently to deal with seasonal fluctuations.”<sup>47</sup> Furthermore, unnecessarily accessing public resources also tends to bring the legitimacy of such access into question.

In this light, it seems necessary to draw a crucial distinction: (i) for companies in need, i.e. for companies that would actually not be able to cope with extraordinary market conditions, the use of STW schemes tends to work as a useful tool aiding recovery; (ii) for companies not “in need”, a reduction of working time should imply a serious rethinking of the company’s organization.

Moreover, the idea that STW schemes shouldn’t be an ordinary tool for regulating the economy has been highlighted since the 1980s by Mark Freedland, according to whom the government (he referred to the UK, specifically) has “a large number of other more significant regulators of the labour economy at its disposal.”<sup>48</sup> Furthermore, the use of STW schemes could be attacked by the European Commission “as amounting to a distortion of competition.”<sup>49</sup>

At the same time, Freedland notes that such subsidising seems “more acceptable” to the European Commission because it can avoid redundancies. Another advantage is that such schemes bring together employment law, collective bargaining and social security law by making them converge on “the protection of the employee against loss of income when he is placed on short time”.<sup>50</sup>

However, if we think about EU employment policy of the past two decades, and the goal of achieving both security and flexibility, i.e. the flexicurity goal that the Member States have adopted in following the European Employment guidelines, the massive use of STW can be considered a “step back toward job security”<sup>51</sup> and “problematic for flexicurity”, as Astrid Sanders puts it. In particular, STW schemes can be problematic if they are not linked to activation initiatives, as in the majority of cases in the EU Member States.

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<sup>46</sup> C. Lang, S. Clauwaert, I. Schömann, “Working Time Reforms”, p. 6.

<sup>47</sup> P. Cahuc, S. Nevoux, “Inefficient Short-Time Work”, VOX CEPR’s Policy Portal, 14 September 2017. They refer in particular to the French situation.

<sup>48</sup> M. Freedland, “Leaflet Law: the Temporary Short Time Working Compensation Scheme”, *Industrial Law Journal*, Vol. 9, 1980, p. 254 ff. In particular p. 255.

<sup>49</sup> M. Freedland, “Leaflet Law: the Temporary Short Time Working”, p. 255.

<sup>50</sup> M. Freedland, “Leaflet Law: the Temporary Short Time Working”, p. 256.

<sup>51</sup> A. Sanders, “The Changing Face of ‘Flexicurity’ in times of austerity?”, in N. Countouris, M. Freedland, *Resocialising Europe in a Time of Crisis*, Cambridge Un. Press, 2013, p. 314 ff., in particular p. 322.

### 3. Working time in Italy

In Italy, the power to limit working hours is granted by the constitution, according to which the maximum length of the working day is set by law.<sup>52</sup> Initially, Law n. 473/1925 fixed the maximum working hours to 48 hours per week, with the possibility of overtime<sup>53</sup> of 2 hours per day, and 12 hours per week. Then, the Italian system developed increasingly toward a reduction in working time, such as in several other EU countries. This reduction was achieved, in particular, through the collective bargaining of the 1980s: trade unions supported reductions in working time in order to make available more work opportunities for all workers;<sup>54</sup> the economic situation of those years also allowed important reductions to be achieved through paid leave. Then, Law n. 196/1997 set normal working hours at 40 hours per week. In particular, since the end of 1980s and during the 1990s, working time has been viewed as a means of offering flexibility to employers and avoiding collective dismissals.

Furthermore, in 1991, a law<sup>55</sup> was adopted seeking to institute measures to recognize public benefits to workers in the case of temporary lack of work or collective dismissal.<sup>56</sup> The *cassa integrazione* was systematically instituted as a benefit available to companies in specific circumstances in order to pay workers in certain cases of temporary lack of work.<sup>57</sup> According to several

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<sup>52</sup> Article 36.2 of the Italian Constitution.

<sup>53</sup> Overtime is “hours worked beyond the legal work week”. Definition from A. Supiot, M. E. Casas, J. De Munck, P. Hanau, A. Johanson, P. Meadows, E. Mingione, R. Salais and P. van der Heijden, *Transformation of Labour and Future of Labour Law in Europe - Final Report for the European Commission*, June 1998, p. 232.

<sup>54</sup> This idea was launched by France to promote a reduction of working hours: soon it has been adopted also in other countries, such as Italy. B. Hepple, “Diritto del lavoro e crisi economica: lezioni della storia europea”, *Giornale di diritto del lavoro e relazioni industriali*, Vol. 123, 2009.

<sup>55</sup> Legge n. 223/1991.

<sup>56</sup> In specific, in the case of temporary lack of work and in case of unemployment.

<sup>57</sup> The Law n. 223/91 regulated the *cassa integrazione straordinaria (cigs)* and introduced the *indennità di mobilità*. These two measures are applied to companies with more than 15 workers in the 6 months previous the presentation of the application. The cigs application should include the company program to face the social consequences coming from the lack of work. The cigs is used in extraordinary situations, such as restructurings, reorganizations or conversions business. In case of temporary lack of orders or a hard situation on the market, not depending on the company or on the workers, the company can apply for the *cassa integrazione ordinaria (cigo)*, regulated by the Law n. 167/1975 (*legge 20 maggio 1975, n. 164*).

In case of collective dismissal of at least 5 persons within 120 days, for objective reasons, there is a specific procedure. Then, the dismissed worker can access to the benefit of *indennità di mobilità*, if she/he: (i) has been hired by the company at least for one year; (ii) has worked by the company at least six months. The procedure for both the *mobilità* and the *cassa integrazione straordinaria* involves the trade unions.

scholars, this measure, which is a type of public SWT scheme, has often been misused,<sup>58</sup> i.e. without real need, simply to save companies' money. Since the 2000s, developments in the regulation of working time have exhibited different tendencies from earlier decades: regulation has become more fluid and flexibility has been extended.

The Legislative Decree n. 66/2003<sup>59</sup> transposed the Directives 93/104/EC and 2000/34/EC. Meanwhile, several new typologies of contract were introduced in Italy, with relevant effects on working time, especially in terms of increasing flexibility.

Indeed, high numbers of typologies of atypical contracts and increasing possibilities to sign temporary contracts characterize the Mediterranean countries and their “*flexicurity* at the margin”, i.e. models very different from the Scandinavian ones, especially in terms of security granted to workers.<sup>60</sup> For example, with regard to part-time work, the law was changed in Italy in 2003<sup>61</sup> via the possibility to introduce elastic and flexible clauses through the individual contract. These “elastic clauses” allow working hours to be increased, while “flexible clauses” allow an employer to change start and finish times of an employee’s working day (e.g. a shift from 8 am to 12 am could be shifted to 2 pm to 6 pm).

At the same time, the fixed term contract has been significantly modified. In this regard, the recent legislation is particularly relevant. A 2012 law<sup>62</sup> introduced the possibility of signing a first contract without the need for any

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The *indennità di mobilità* is a social security benefit of one, two or three years depending on the age of the beneficiary. It amounts to 80% of previous income from employment of the last six months, up to a maximum of € 971,71 or, € 1.167,91 pre-tax, per month.

The reform n. 92/2012 modified the legislation: the *indennità di mobilità* will be gradually replaced by the Aspi. The Law 10 December 2014, n. 183, and the following Legislative Decree, has now replaced the Aspi with the new Naspi and introduced further modification in the field.

<sup>58</sup> S. Renga, *La tutela contro la disoccupazione*, Collana Dottrina e Giurisprudenza sistematica di diritto della previdenza sociale, Utet, 1997, p. 22; R. Garofalo, “Ammortizzatori sociali e occupabilità”, *Diritto delle relazioni industriali*, Vol. 3, 2006, pp. 671-689; F. Liso, “Gli ammortizzatori sociali. Percorsi evolutivi e incerte prospettive di riforma”, in P. Curzio (eds.) *Ammortizzatori sociali, regole, deroghe, prospettive*, Cacucci Editore, 2009; A. Di Stasi, “Gli ammortizzatori sociali tra “il cielo delle idee” e le più recenti novità legislative. Una introduzione”, *Rivista giuridica del lavoro e della previdenza sociale*, Vol. 2, 2011, 339-358, 344; F. Carinci, “Provaci ancora Sam: ripartendo dall’art. 18 dello Statuto”, *Rivista Italiana di Diritto del Lavoro*, Vol. 1, No. 3, 2012; etc.

<sup>59</sup> Such Decree has been partially modified by further Decrees.

<sup>60</sup> F. Carinci, “Provaci ancora Sam”.

<sup>61</sup> *Decreto Legislativo n. 276/2003*. This possibility was subordinated, before this change, to the eventual regulation introduced by collective bargaining: M. Brollo, “Le flessibilità del lavoro a tempo parziale e i differenti equilibri fra autonomia collettiva e autonomia individuale”, *Argomenti di diritto del lavoro*, 2002, pp. 723-759.

<sup>62</sup> *Legge n. 92/2012*.

reason proving the temporary nature of the contract. A 2014 law<sup>63</sup> provided that no reason proving the temporary nature of the contract is needed to sign a temporary work contract up to 36 months. This has been presented by the Italian government as an important measure to cope with unemployment, but it could also increase job insecurity and downsize workers' rights.<sup>64</sup>

In February 2015, the Italian government issued several legislative decrees to implement Law 10 December 2014, n. 183; the *contratto unico* was adopted, a contract with lower guarantees in comparison to traditional open-ended contracts, including in terms of protection in case of dismissal. This aspect makes the *contratto unico* similar to a temporary work contract rather than an open-ended contract.

During the economic crisis, from the end of 2008, Italy has continued using the *cassa integrazione* and increased the adoption of another similar measure: the *contratto di solidarietà*. This measure has been used increasingly in recent years. Such a measure may be adopted in specific collective agreements that are signed at the company level. This kind of agreement allows the working time of workers to be reduced, and covers hours that are not worked, with benefits covering a percentage of the lost wage.

The *contratti di solidarietà* have been backed in recent years by the State – and also by social partners – as a preferable measure to the *cassa integrazione*. In this way, the Government aims to guarantee working time reduction oriented toward an effective recovery of the company. As a matter of fact, the *contratto di solidarietà* implies the greater involvement of the company in planning its production activity than do other kinds of STW. Moreover, the wage-percentage available to workers in case of *contratto di solidarietà* was increased during the crisis (from 60% to 80%).

During the crisis, special kinds of public SWT schemes have been adopted in order to guarantee benefits for workers that are not covered by benefits: they are named *ammortizzatori in deroga*. Such measures seek to provide protection to workers who terminate their benefits or who didn't have access to any protection in case of unemployment and/or temporary lack of work.

One should note that all the public SWT schemes in Italy are conditional on activation duties oriented toward enabling workers to enhance their professional profiles. Spain has adopted similar legislation, but in both cases

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<sup>63</sup> Decreto Legge n. 34/2014, amended and transformed into the Legge n. 78/2014

<sup>64</sup> F. Carinci, "Jobs Act, atto I. La legge n. 78/2014 fra passato e futuro", *Working Paper ADAPT*, No. 164, 2014. Moreover, the maximum length of temporary work, i.e. 36 months, could be easily extended throughout collective bargaining even at the company level.

the problem remains the inefficiency of national public employment services.<sup>65</sup>

The current economic crisis has strengthened the thesis that the reduction of working hours could be a valid measure to deal with unemployment, an idea that was common in the 1990s. Ferrante suggested achieving this goal through public SWT schemes linked to adequate training and activation initiatives. At the same time, Ferrante highlighted the need to take into consideration the impact of reductions in working time on pensions.<sup>66</sup> However, this proposal doesn't address the problem of companies using public SWT schemes merely in order to save money and reduce costs.

Nevertheless, public SWT schemes have traditionally played a crucial role in Italy's public macroeconomic policy.<sup>67</sup> Moreover, for specific sectors they are recognised as a means to integrate low wages.<sup>68</sup>

At the same time, it seems nowadays to be crucial to take into consideration the need to ensure the stability of public finances and to limit public expenditure: as a matter of fact, the total hours covered by public SWT

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<sup>65</sup> F. Liso, "Brevi appunti sugli ammortizzatori e sui servizi all'impiego nel Protocollo del 23 luglio 2007", in A. Perulli (eds.), *Le riforme del lavoro. Dalla legge finanziaria 2007 al protocollo sul Welfare*, Halley Editrice, 2007. P. 113; A. Alaimo, *Il diritto sociale al lavoro nei mercati integrati. I servizi per l'impiego tra regolazione comunitaria e nazionale*, Giappichelli, 2009; F. Liso, "Servizi all'Impiego", in *Enciclopedia giuridica Treccani*, 2007, pp. 1-10; F. Liso, "Appunti sulla trasformazione del collocamento da funzione pubblica a servizio", in R. De Luca Tamajo, M. Rusciano, L. Zoppoli (eds.), *Mercato del lavoro: riforma e vincoli di sistema*, Editoriale scientifica, 2004; F. Liso, "I servizi all'impiego", in D. Garofalo, M. Ricci, *Percorsi di diritto del lavoro*, Cacucci, 2006; F. Liso, "Collocamento. I) Diritto del lavoro", (update), in *Enciclopedia giuridica Treccani*, 1988, pp. 1-24; S. del la Casa Quesada, "Políticas activa y políticas pasivas de empleo: la respuesta de la protección por desempleo ante la crisis económica", in Susana del la Casa Quesada, María Rosa Vallecillo Gámez (eds.), *Empleo, mercado de trabajo y sistema productivo: el reto de la innovación en políticas de empleo*, Editorial Bomarzo, p. 214; R. Ballester, "European Employment Strategy and Spanish Labour Market Policies", *Jordasas de Economía Laborar - Working Papers*, No. 14, 2005. *Department of Economics, University of Girona*, pp. 1-31, in particular p. 13, 14; M. Á. Malo, "Labour market policies in Spain under the current recession", *Discussion Paper of the International Labour Organization, International Institute for Labour Studies*, Vol. 211, 2010, p. 69 ff.

<sup>66</sup> V. Ferrante, "Recenti evoluzioni nella disciplina degli ammortizzatori sociali: fra sostegno alla riduzione dell'orario e generalizzazione delle tutele", *Diritto relazioni industriali*, Vol. 4, 2009, p. 918 ff.

<sup>67</sup> N. Lafranconi, "La Cassa integrazione guadagni come strumento di politica economica e sociale", *Previdenza Sociale*, 1966; M. Cinelli, *La tutela del lavoratore contro la disoccupazione*, Franco Angeli, 1982; G. G. Balandi, *Tutela del reddito e mercato del lavoro nell'ordinamento italiano*, Giuffrè, 1984; O. Mazzotta, "Diritto del lavoro" in G. Iudica, P. Zatti (eds.) *Trattato di Diritto Privato*, Giuffrè, 2008, p. 803; etc.

<sup>68</sup> F. Liso, "I trattamenti di disoccupazione. Riflessioni critiche", *Rivista italiana di diritto del lavoro*, Vol. 1. 1995, pp. 339-360, see 341; P. Bozzao, *La tutela previdenziale del lavoro discontinuo*, Giappichelli, 2005, p. 105.

schemes increased from 245,589,683 in 2005, to 915,470,123 in 2009, to more than one billion in 2012, 2013 and 2014.<sup>69</sup>

Even the work-life balance dimension has been discussed in Italy and this has resulted in important achievements, both in terms of legislation and collective bargaining: the possibility of shaping working time to personal needs has indeed been expanded. The problem, however, remains a lack of effectiveness or utilisation of such an opportunity, probably due to a weakening of the trade unions' role and the lack of a labour market culture supporting companies' to make organisational changes to improve work-life balance.

With regard to flexibility in favour of employees, one relevant legislative achievement is represented by Article 9 of the Law 53/2000, which introduced the possibility of modifying the working time of a worker in order to achieve a balance between work and personal life, within an ambitious project to adapt the "times of the cities" (of available services, shops, offices, etc.) to the needs of people and families<sup>70</sup>. This very significant project has still not achieved adequate results.<sup>71</sup> For this reason, Government, companies' associations and trade unions signed an agreement in 2011 to support work-life balance policies through flexible working hours and other family-friendly measures, with the main aim of supporting female employment.<sup>72</sup>

In 2015, the Legislative Decree n. 151/2001 for parental leave and other tools to support maternity, paternity and work-life balance was modified in order to strengthen those rights addressed to parents.<sup>73</sup> In order to achieve

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<sup>69</sup> The numbers refer to the granted hours in case of *cassa integrazioni guadagni ordinaria, straordinaria* and *in deroga*. See the website of the National Institution of Social Security:

<http://www.inps.it/webidentity/banchestatistiche/cig4/index01.jsp?CMDNAME=SRT345>

<sup>70</sup> A. R. Tinti, "Conciliazione e misure di sostegno. Sulle azioni positive di cui all'art. 9 della legge n. 53/2000", *Lavoro e diritto* Vol 23, No. 2, 2009, pp. 173 ff.; D. Gottardi, "Lavoro di cura. Spunti di riflessione", *Lavoro e Diritto*, No. 1, 2001, pp. 121 ff.; etc.

<sup>71</sup> The lack of adequate results is evident from the low number of granted projects: just 54 granted projects on February 2009: <http://www.politichefamiglia.it/media/50843/ammessi%20febbraio%202009.pdf>; just 61 on February 2008: <http://www.politichefamiglia.it/media/48775/progetti%20feb08%20per%20decreto.pdf>; just 73 on June 2008: <http://www.politichefamiglia.it/media/49396/tabella%20progetti%20finanziati%20giugno%202008.pdf>; just 91 granted projects on October 2008: <http://www.politichefamiglia.it/media/49958/tabella%20dei%20progetti%20ammessi%20a%20finanziamento%20ott2008.pdf>

<sup>72</sup> Trilateral Agreement, 8 of March 2011 "Azioni a sostegno delle politiche di conciliazione tra famiglia e lavoro": see <http://www.governo.it/backoffice/allegati/62688-6620.pdf>

<sup>73</sup> Legislative Decree n. 80/2015.



this goal, a decree has been recently adopted providing a tax cut for those employers who managed to reach agreement with relevant trade unions and/or company workers' representatives to adopt measure to improve work-life balance.<sup>74</sup>

### **3.1. Collective bargaining: the chemical industrial sector**

Legislative Decree n. 66/2003 provides for a wide range of opportunities to waive legislation in the field of working hours regulation, such as the setting of the period of time to count average working time, daily rest, breaks, etc. In Italy, this opportunity has been extensively exploited in collective bargaining.

Developments in working hours regulation of the past decade in the chemical industrial sector would seem to provide a fruitful exemplar of changes in working hours regulation in general, since this sector is one of the most advanced in Italy in terms of collective bargaining. Moreover, collective bargaining in this sector is influenced by multinational companies, especially in the pharmaceutical sector, and is characterized by a highly-developed industrial relations systems that is able to introduce innovative outcomes via collective bargaining<sup>75</sup>.

Working time accounts or time banking schemes allow for greater flexibility in the management of working hours: workers work more when work demand is high, and work less when demand is low. Normally, measures of this kind are considered to be tools that create “win-win situations”, because they provide benefits for both employers and employees. Workers may use time-banking schemes in order to balance work with their personal lives, while companies may use these schemes to cope with fluctuations in demand. This “ambiguity”, however, can lead to two different outcomes: a “win-win” situation or a conflict between firms and employees<sup>76</sup>. Thus, individual time-banking accounts are actually often used by companies to face market fluctuations. In Denmark, 77% of all firms signed agreements with trade unions on varying weekly working hours, but the average within a one-year period does not exceed 37 hours.<sup>77</sup>

Since the 1990s, collective bargaining in the industrial chemical sector has changed its approach to overtime: the national sectorial agreement warned that (i) overtime work should be used carefully and (ii) social partners

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<sup>74</sup> In order to put into effects the Legislative Decree n. 80/2015, the Government adopted a decree on 14. September 2017 which recognised the mentioned tax cut on social contributions.

<sup>75</sup> For example, the national collective agreement of the chemical sector has introduced working time accounts from the 90s.

<sup>76</sup> A. Kümmerling, S. Lehndorff, “The use of working time-related crisis”, p. 18, 19.

<sup>77</sup> A. Kümmerling, S. Lehndorff, “The use of working time-related crisis”, p. 23.

should evaluate alternative possibilities to avoid its application. In 1996, this approach changed, moving toward the increased use of overtime through agreements at the company level.

Working time accounts had already been introduced in the 1996 national collective agreement of the Italian chemical sector, as a means to convert overtime hours into days of rest, to be used compatibly to the company's needs. The worker may choose to use 50% of their overtime hours as rest days (to be placed in a time-banking account), with the other 50% to be paid; or all as rest days; or all to be paid.

Moreover, this sector, as others (e.g. the textile sector) is characterized by a reduction in working hours, achieved through additional days of paid leave. In this case, it is the company that decides on the allocation of the leave days and the adjustment of working hours (average weekly working time: 37 hours and 30 minutes).

In case of vocational training of workers, the agreement of 2002 specified that adjustments in working hours were to be adopted.

The agreement of 2006 (reaffirmed by the most recent agreement of 2015) set normal working hours by averaging a worker's working hours over a 12 month period, using the opportunity offered by Directive 2003/88 EC to waive the limit of four months (six if stated by law). Thus, the chemical sector demonstrated its capacity to offer flexibility to social partners.

Currently, increasing power has been accorded to companies to intervene in the field of working hours, even when these would temporarily derogate from national agreements. However, this power remains contained within the framework stated by the national agreement, which can shape precise rules. Moreover, any derogation must be agreed between social partners. In this context, Article 8 of Decree Law n. 138/2011 – which amended and transformed into Law n. 148/2011 – introduced the possibility of allowing agreements at company levels that waive both the national agreement and the law in specific matters, which include working hours. On the other hand, national agreements cannot waive the law, even in the specific fields enumerated in Article 8, which is considered to constitute an excessive interference in the autonomy and independence of social partners.<sup>78</sup> Article 8 is oriented toward individualization and deregulation of labour law, and not only in the realm of working time. For this reason, Perulli believes that it would be necessary to create a supranational “frame of reference” in which companies can operate according to shared and harmonized rules.<sup>79</sup>

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<sup>78</sup> V. Leccese, “Il diritto sindacale al tempo della crisi. Intervento eteronomo e profili di legittimità costituzionale”, *Giornale di diritto del lavoro e relazioni industriali*, No. 4, 2012.

<sup>79</sup> A. Perulli, “La contrattazione collettiva ‘di prossimità’: teoria, comparazione e prassi”, *Rivista Italiana di Diritto del Lavoro*, Vol. 4, 2013, pp. 918 ff.

Recently, the national agreement for the industrial chemical sector provided employees with the ability to transfer a part of their personal time-banking accounts to co-workers, e.g. in order to support those parents who must care for children with particular health problems.<sup>80</sup>

#### 4. Some aspects of the Spanish working time regulation

Spain can be considered a “state driven flexibility” system, i.e. one in which a crucial role in working time is played by the State, legislator, or governing body.<sup>81</sup>

A reduction in working hours may be achieved with or without the involvement of collective agreements between trade unions and companies, and is “often accompanied by temporary job guarantees under the imminent threat of redundancies.”<sup>82</sup>

Before 2012, the legislation provided social partners with the possibility of reaching flexible working hours by means of collective agreements. In 2012, the newly-elected Spanish government adopted a royal legislative decree, n. 3/2012<sup>83</sup>, which applied to industrial relations, collective dismissal, and collective bargaining. This reform was adopted without trade unions involvement, and without taking into consideration the recommendations of an agreement signed by the social partners no more than 20 days before issuing the decree.<sup>84</sup>

The new regulation weakened the mechanism of negotiation and opened wide the possibility for unilateral employers’ decisions with regard to

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<sup>80</sup> Agreement to re-contract the National Agreement for the Chemical Industrial Sector, signed the 15. October 2015 and in force since the 1<sup>st</sup> January 2016 till the end of December 2018.

<sup>81</sup> K. Bishop, “Working time patterns in the UK, France, Denmark and Sweden”, *Labour Market Trends*, Office for National Statistics, 2004, p. 114. It is also interesting to highlight that in Spain the transposition of the Directive 93/104/EC was done in an unusual short time, as an opportunity to reduce the rigidity of the law in the field. Some scholars think that the transposition followed the letter of the Directive; some others think that the Directive has been misunderstood in some aspects. See G. Ricci, “El tiempo de trabajo en España entre tradición y actualidad”, *Working Paper Centre for the Study of European Labour Law "Massimo D'Antona"*, No. 4, 2002, p. 23. See also M. A. Castro Argüelles, “La incidencia de las directivas comunitarias en la Reforma laboral”, *Revista Española de Derecho del Trabajo*, 1998, 889.

<sup>82</sup> A. Kümmerling, S. Lehnndorff, “The use of working time-related crisis”, p. 14.

<sup>83</sup> *Real Decreto Ley n. 3/2012*.

<sup>84</sup> A. Baylos Grau, “El sentido general de la reforma: la ruptura de los equilibrios organizativos y colectivos y la exaltación del poder privado del empresario”, *Revista de Derecho Social*, Vol. 57, 2012, pp. 9-18, 10; M. E. Casas Baamonde, Rodríguez-Piñero, M. Bravo-Ferrer, F. Valdés Dal-Re, “La nueva reforma laboral”, No. 5, 2012, *Relaciones Laborales*.

several aspects of the labour contract, strengthening companies' managerial powers.<sup>85</sup>

Some months before the issuing of the 2012 decree, the agreement on employment and collective bargaining (*II Acuerdo para el Empleo y la Negociación Colectiva*<sup>86</sup>) allowed for significant increases in the internal flexibility of working hours. This could be achieved by general collective labour agreements between trade unions and companies that explicitly determined the distribution of working hours. This distribution could also be function as an alternative to overtime and temporary contracts. The agreement on employment and collective bargaining also provided for the management of a high percentage of working time by employers, although employers were required to provide justification for this. Then, royal legislative decree n. 3/2012 provided employers with the ability to take over management of the spread-over without reasons justifying these changes in working hours. According to the decree, 5% of daily hours were able to be allocated in a flexible way during the year; this percentage has since been increased to 10%.<sup>87</sup>

With regard to part-time work, a possible agreement may be signed between the employer and the employee: according to this agreement the part-time worker may work extra hours<sup>88</sup> (*horas complementarias ordinarias*) within specific limitations. This is possible in the case of open-ended contracts only. A 2013 decree<sup>89</sup> allowed for extra working hours in both cases of open-ended and fixed-term contracts, but contracts must be for at least of 10 hours of work per week, averaged across one year. It is possible to make such an agreement in respect 30% of normal working hours, and this may increase to 60% through collective agreements.

Notwithstanding eventual agreements on extra working hours, in the case of an open-ended part-time contract<sup>90</sup>, the employer may request additional working hours (15%, which may be increased to 30% through collective agreements); the worker is free to refuse or accept such a request (*horas complementarias extraordinarias o adicionales*).

This regulation shows an effort on the part of the Spanish social partners and government to guarantee more flexibility. However, the regulations offer the

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<sup>85</sup> F. Ferrando García, "El reforzamiento del poder de dirección tras la reforma laboral de 2012", *Revista De Derecho Social*, Vol. 61, 2013, p. 72.

<sup>86</sup> This Agreement has been signed between social partners on the 25<sup>th</sup> of January 2012.

<sup>87</sup> F. Ferrando García, "El reforzamiento del poder de dirección", pp. 74-77.

<sup>88</sup> These extra working hours are not considered overtime, which remains a different regulatory scheme.

<sup>89</sup> *Real Decreto Ley n. 16/2013*.

<sup>90</sup> In this case the part-time contract should be of minimum 10 weekly hours as an average in one year.

possibility of achieving increased flexibility through employers' unilateral decisions, increasing their managerial powers. Furthermore, these changes do not seem to be oriented toward work/life balance, as they do not consider personal workers' needs<sup>91</sup>; rather, they are focused on employers' flexibility.

## 5. Some aspects of the Danish working time regulation

Denmark is considered a “negotiated flexibility” system, in which “actual working time is set by bargaining between workers and enterprises”. In particular, Denmark traditionally regulates working time by collective agreements between parties in the labour market.<sup>92</sup> Thus, there is no general law on working hours, with the exception of a few statutory rules.

The Work Environment Act provides that an employee is entitled to 11 hours of rest within a period of 24 hours. The rest time can be reduced to 8 hours in case of shift work and agricultural work, in particular cases such as force majeure, accidents, etc., and in cases determined by the Ministry of Labour, also by means of collective agreements. In any case, a compensating period must be provided. The Work Environment Act also states that an employee is entitled to a weekly day off and night time off: the day off work should be on Sunday, but it can be postponed and substituted with another day off, if such postponement is considered necessary for the nature of work, or for protective reasons, or for reasons of care of human beings, animals or plants. With regard to daily working hours, the 1919 collective agreements introduced the 48-hour week, with a maximum of 8 hours per day. However, collective agreements may allow for longer daily working hours.<sup>93</sup>

In 2002, the Danish Parliament approved a law on part-time work in order to foster agreements to support part-time work at enterprise-level, regardless of collective agreements already in place. At the same time, the act provides protection against possible pressures to accept part-time work<sup>94</sup>.

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<sup>91</sup> J. López Gandía, “Los contratos formativos y a tiempo parcial tras la reforma laboral de 2012”, *Revista de Derecho Social*, Vol. 57, 2012, p. 85, 94-98.

<sup>92</sup> R. Blanpain, “General Report”, in R. Blanpain, E. Köhler (eds.), *Legal and Contractual Limitations to Working-Time in the European Community Member States*, European Foundation for the Improvement of Living and Working Conditions, Kluwer Law and Taxation Publishers, 1988, p. 19. See also: J. Kristiansen, *The growing conflict between European uniformity and national flexibility*, Denmark, Djørf Publishing, 2015.

<sup>93</sup> O. Hasselbalch, *Labour Law in Denmark*, Djøf, Wolters Kluwer, 2010, pp.113-115.

<sup>94</sup> O.Hasselbalch, *Labour Law*, pp.113-115. The number of women in part-time jobs remained stable from 2000 till 2006, with 35,8%. Men employed in part-time work represent 13,6% in 2006, a percentage that increased by 3,4 from 2000 to 2006.

A need to reduce working hours may be also based on a shortage or on customers' orders. In this case, the employer can reduce working hours (i.e. introduce work-sharing, *arbejdsfordeling*)<sup>95</sup>.

Average weekly working hours have slightly decreased in Denmark from 35 hours in 2000 to 34.5 hours in 2006, making the working week in Denmark one of the "shortest formal working weeks in Europe equivalent to around 1,600 hours a year per worker against a 1,800-hour European average."<sup>96</sup> The 2013 OECD Economic Survey on Denmark shows that people in this country work 1,546 hours a year, less than the OECD average of 1,765 hours. Some 2% of employees work very long hours, a percentage much lower than the OECD average of 9%, with 3% of men working very long hours compared with just 1% for women.<sup>97</sup>

During the crisis in Denmark, companies made an attempt to avoid dismissals: they adopted work-sharing and training measures. In particular, trade unions called for the extended use of training as a measure to avoid mass redundancies.<sup>98</sup> Moreover, holiday shutdowns have been a "significant measure" for Denmark, used especially in the past by large companies and now used extensively by Danish small and medium enterprises (SMEs).<sup>99</sup> This kind of measure is reported from automobile manufacturers and suppliers in Spain, too. In Italy, holiday shutdowns are compulsory in order to access *cassa integrazioni* and *contratti di solidarietà*: however, all holidays must be planned.

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<sup>95</sup> O. Hasselbalch, *Labour Law*, p. 116.

<sup>96</sup> M. Ballebye, H. Ourø Nielsen, "Working time in the European Union: Denmark", 2009, Observatory: EurWORKDate, Oxford research, <http://eurofound.europa.eu>  
In 2004 Bishop showed that shows that 45 % of all employees work 37 hours per week, as an average over a period of 6 or 8 weeks, in some cases 6 months. In this country 47 % of men and 43 % of women report 37 hours per week as the usual working time. This result is considered a direct outcome of the 1987 agreement in the metal working industry that then spread to other sectors: K. Bishop, "Working time patterns in the UK, France, Denmark and Sweden", *Labour Market Trends*, 2004, Office for National Statistics, pp. 114, 116, 119.

<sup>97</sup> OECD, *OECD Economic Surveys: Denmark 2013*, OECD Publishing, 2014: [http://www.keepeek.com/Digital-Asset-Management/oecd/economics/oecd-economic-surveys-denmark-2013\\_eco\\_surveys-dnk-2013-en#page1](http://www.keepeek.com/Digital-Asset-Management/oecd/economics/oecd-economic-surveys-denmark-2013_eco_surveys-dnk-2013-en#page1)

<sup>98</sup> I. Stuvoy, C. Jørgensen, "Tackling the recession: Denmark", Eurofound, European Monitoring Centre on Change, 2009: <http://www.eurofound.europa.eu/emcc/erm/studies/tn0907020s/dk0907029q.htm>

<sup>99</sup> A. Kümmerling, S. Lehndorff, "The use of working time-related crisis", p. 16. See also C. Jørgensen, "Increase in holiday shutdowns due to recession", Eurofound, European Observatory of Working Life, 2013: <http://www.eurofound.europa.eu/eiro/2009/07/articles/dk0907031i.htm>

## 6. The different dimension of working hours: further remarks and conclusion

As discussed, above, working time regulation developed toward different goals, which have interacted over the years and driven the European and domestic debate on working time. These goals may be summarized as follows: (i) ensuring a higher level of protection of the health and safety of workers; (ii) ensuring a higher level of flexibility for both employers and employees; and (iii) dealing with unemployment.

Directive 93/104/EC<sup>100</sup> aimed at ensuring a higher level of protection of the health and safety of workers by limiting working time. At the same time, protection of the health and safety of workers is a fundamental factor to be considered by social partners in evaluating whether it is possible to waive the working time regulation in favour of flexibility. Indeed, Directive 93/104/EC – then Directive 2003/88/EC – has been crucial to the introduction of important opportunities to achieve flexibility by providing the chance to waive legislation and by determining working time as an average taken over a period of 4, 6 or 12 months.

Thus, working time is a means of ensuring a better level of flexibility for both employers and employees. With regard to flexibility in favour of employees, work should be adapted “to the worker, in particular in the context of working time”.<sup>101</sup> This may be achieved through measures geared toward work/life balance, such as paid leave, special working time, part-time contracts, etc. Part-time work can facilitate the reconciliation between occupational and personal life; however, it is traditionally not prevalent in the Mediterranean countries<sup>102</sup>.

Flexibility for employers has been called for, in particular, during the current economic recession and has been achieved throughout domestic laws and collective bargaining. At the same time, employers have at their disposal a broad power to sign atypical work contracts and, regarding part-time, to propose elastic and flexible clauses.

Common measures are adopted in the countries under analysis through collective bargaining in order to reduce working time: holiday shutdowns,

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<sup>100</sup> Directive 2003/88/EC codified the previous legislation, without introducing innovations, and replaced Directives 93/104/EC and 2000/34/EC.

<sup>101</sup> A. Supiot, M. E. Casas, J. De Munck, P. Hanau, A. Johanson, P. Meadows, E. Mingione, R. Salais and P. van der Heijden, *Transformation of Labour and Future of Labour Law in Europe - Final Report for the European Commission*, June 1998, p. 542.

<sup>102</sup> From the Eurostat data it is possible to highlight the evident differences in terms of part time in Italy, Spain and Denmark: <http://ec.europa.eu/eurostat/tgm/refreshTableAction.do?tab=table&plugin=1&pcode=tps00159&language=en>

banking accounts, and shaping of weekly working hours. Public SWT schemes are also commonly adopted in the three Member States.

Hence, during the crisis, the reduction of working time has been oriented both toward ensuring a higher level of flexibility in favour of employers and toward dealing with unemployment by avoiding dismissals. This reduction has often been connected to public subsidies. Italian and Spanish legislation passed during the crisis has attempted to implement and boost training initiatives linked to benefits provided in case of lack of work. But a lack of efficiency in the Italian and Spanish public employment services has frustrated this attempt. Thus, it may be noted that mere legislative reforms cannot be fully effective, especially if they do not take into account traditional domestic problems. Cultural aspects are extremely relevant and can, moreover, impact on the implementation of rules. Further, it should be noted that the recognition by Governments of the pivotal role of social partners in facing the crisis is a factor that has characterized the Danish response, but not those of Italy and Spain. In this regard, in Italy, we can speak of “*rigetto sindacale*”<sup>103</sup> and in Spain of “*depreciación del papel del sindicato*”<sup>104</sup>, i.e. the Government does not recognise the role of the unions.

In Spain, flexibility during the crisis has been achieved by law – allowing employers’ unilateral decisions and increasing the employers’ managerial power – and by collective bargaining. Recent legislation in both Italy and Spain aims at deregulation supported by government, often without considering social partners’ positions, especially those of trade unions. In Denmark, on the other hand, social partners play a pivotal role in the labour market and in companies.<sup>105</sup>

During the crisis, companies’ need for flexibility seems to have been particularly favoured, whereas flexibility in support of work-life balance seems to have been more difficult to achieve. Together with internal

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<sup>103</sup> F. Carinci, “Provaci ancora Sam”, p. 3.

<sup>104</sup> A. Bylos Grau, “El sentido general de la reforma”, p. 17.

<sup>105</sup> A. Tangian, “Not for bad weather: flexicurity challenged by the crisis”, ETUI Policy Brief, N. 3, 2010, European Economic and Employment Policy, pp. 2, 75; K. Madsen, “Activation Policy in Denmark”, Centre for Labour Market Research, Aalborg University, Denmark, Paper for presentation at conference on activation policy, Korea Labor Institute, Seoul, 2009, pp. 4, 17; K. Madsen, “Flexicurity in Danish – A Model for Labour Market Reform in Europe?”, in *Flexicurity – a European Approach to Labour Market Policy*, *Intereconomics* March/April, 2008; G. Färm, H. Jørgensen, P. Palshøj, “Nordicmodel.info: The story of active societies based on welfare and justice” published by the Joint Committee of the Nordic Social Democratic Movement (SAMAK) together with The Social Democratic group in the Nordic Council and the Danish Social Democrats, 1st edition, Copenhagen, June 2006:

<http://s-dialog.dk/default.aspx?site=nordicmodel&func=article.view&id=161473>;

Flaschel P., Greiner A., Luchtenberg S., “Labor Market Institutions and the Role of Elites in Flexicurity Societies”, *Review of Political Economy*, Vol. 24, No. 1, 2012, pp. 103-129, in particular p. 104.



flexibility, i.e. flexibility within the company organization, companies have also largely use SWT schemes in order to achieve even greater levels flexibility, in their own interests. Yet studies show that an excessive use of SWT schemes can be unproductive at the macroeconomic level if they are used merely to address companies' ordinary needs.

Other problems in using SWT schemes include, on one hand, a decrease in workers' wages and, on the other hand, threats to the stability of public finances and the potential for blow-outs in public expenditure.

Thus, attention should be turned toward possible ways in which companies can give back advantages gained from public SWT schemes, in terms of job creation during periods of business success. Indeed, this field of policy would help lay the groundwork for a sustainable society: in this sense, the Danish system may be an effective paradigm to look to. Meanwhile, in the same vein, improvements in work-life balance should also be encouraged.



## **Part III:**

# **Institutions**



## **Contractualization of Social Rights and Actors in the LM: Denmark, Italy, and Spain**

Tania Bazzani

### **Abstract**

Recently, an increasing number of EU Member States have started to link the right to access unemployment benefits to the duty to be “active”. This phenomenon can be seen as a “contractualization of social rights” and entails a number of doctrinal and practical issues that tend to raise many questions and debates. This contribution aims to analyse such processes in three MSs: Denmark, Italy, and Spain. Despite normative and LM differences, regulation of the conditionality between unemployment benefits and ALMP show similar tendencies in these three MSs. This paper will analyse the main legislation in the field, highlighting the relevance of the idea of contractualization in active and passive LMP and its limits, as well as the resulting changing role of selected LM actors, such as social partners, work agencies, employment services and national social security institutions.

### **1. Introduction**

A gradual reshaping of the welfare systems in many of the European Union ('EU') Member States ('MSs') began as early as the 1990s. Since then, access of people/workers to social protection has been made increasingly conditional upon activation initiatives. Indeed, recent reforms in a number of EU MSs have expressly linked the right to access unemployment benefits to the duty to be “active”, i.e. the duty to participate in training initiatives and work-orientation schemes and to accept suitable job offers from a public employment service ('PES'). This conditionality between unemployment benefits and the duty to be active can be interpreted as a form of, or an attempt at, “*contractualization of social rights*”.<sup>1</sup> Such a concept was crucial, in particular, to the New Public Management (NPM), a policy introduced in the United Kingdom by the Thatcher government, beginning in the 1980s, with the aim of modernising the public sector in line with a neo-liberal framework.<sup>2</sup> According to such an approach, social rights become the object

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<sup>1</sup> M. Freedland, P. Craig, C. Jacqueson, N. Kountouris, *Public Employment Services and European Law*, Oxford University Press, 2007, p. 330.

<sup>2</sup> A. Tickell, J. A. Peck, “Social regulation after Fordism: regulation theory, neo-liberalism and the global-local nexus”, *Economy and Society*, Vol. 24(3), 1995, pp. 357-386.

of a contract between citizens, in their role as beneficiary/client, and the public administration.<sup>3</sup> However, as will be discussed, *contractualization* appears to be inconsistent both with the constitutional framework of the three MSs under analysis and with EU goals.

This work will therefore analyse common and divergent aspects of the *contractualization* phenomena in three MSs – Denmark, Italy, and Spain – and will highlight how *contractualization* has influenced the role of crucial LM actors. In particular, the idea of *contractualization* of social rights has influenced the development of the institutions and actors that provide unemployment benefits and activation policies. Therefore, it is important to analyse this process in light of the crucial roles of these institutions and actors, to ensure that the social, civil and political rights of citizens are respected.

This contribution will analyse the main legislation in the field and the importance of *contractualization* in active policies and unemployment benefits, as well as the resulting changing roles of social partners, work agencies, employment services, and national social security institutions. The paper will take into consideration the specific characteristics of the three countries, emphasising the convergence between them on one hand and, on the other hand, the differences that still exist.

It would seem to be important to take into consideration the MSs' systems in order to compare a best practice example with two systems characterized by an effort aimed at improving LM efficiency. In fact, Denmark has been considered to be a best practice model in Europe in ALMPs in recent years, and has a highly-developed welfare system; Spain has one of the highest unemployment rates in the EU, and has implemented a number of reforms to address this problem in the last decade, while Italy has recently introduced social assistance for the uninsured unemployed (people who have never paid national insurance contributions) and for those unemployed who have not reached the minimum contributory requirements to access unemployment benefits. This new assistance tool is the *reddito di inclusione*, and is conditional upon specific activation programs.

As will be shown, despite these differences, the active and passive LMPs of the three MSs display similar tendencies. Nonetheless, such tendencies are developing in their domestic contexts, characterised by specific issues.

Within the current context, according to which the economic crisis remains an ongoing problem for several MSs, the social protection systems of these EU MSs have been put under intense pressure. High unemployment rates and the need to support an increasing number of people, economically and socially, have required governments to increase spending on social

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<sup>3</sup> M. Barzelay, *The New Public Management: Improving Research and Policy Dialogue*, University of California Press, 2001.

protection. At the same time, EU institutions very often stress the need to ensure stability of public finances and to limit public expenditure.

Thus, it seems important to highlight that the concept of *contractualization* of social rights reflects the transition from welfare state systems to *workfare* systems, primarily oriented toward reducing public debt and social security expenditure.<sup>4</sup>

The legislation of several MSs started to promote this transition at the beginning of the 21st Century: from that time onward the relationship between unemployed citizens and public institutions has started to be seen as a sort of *quid pro quo*. Thus, unemployment benefits would be assigned to unemployed people only if the latter accepted the obligation to be active by signing a contract or declaration. Meanwhile, private bodies were called upon to play different roles in this changing legal framework.

At the same time, *contractualization* itself remains up for debate, especially in the context of the constitutional legal framework of the three MSs, as I will show in the next section.

## **2. The limits of the *contractualization* approach**

Before analysing the relationship between changing rules governing institutions and LM actors and the tendency toward *contractualizing* social rights, it is necessary to refer to the constitutional framework in the three MSs under analysis with regard to both activation duties and rights to unemployment benefits, in order to highlight some of the limits of the *contractualization* approach.

The Danish, Italian and Spanish Constitutions guarantee social protection to those affected by unemployment. This is particularly important to prevent social exclusion and to create the conditions necessary to allow citizens to participate in society.

In each of the systems under analysis, unemployment benefits are connected with both a duty and a right to work. Access to professional training and activation initiatives is recognised in the legislation of each of the MSs under consideration, as a way of supporting people toward employment.

In all three MSs, the right to work and the right to be supported in the case of unemployment are viewed as two means of creating the conditions for citizens' participation in economic, political and social life. Thus, unemployment benefits and activation initiatives can provide the conditions for such participation<sup>5</sup>

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<sup>4</sup> J. Peck, *Workfare States*, The Guilford Press, 2001, p. 118, 119.

<sup>5</sup> J. F. Handler, *Social Citizenship and Workfare in the United States and Western Europe: The Paradox of Inclusion*, Cambridge University Press, 2004.

Indeed, democratic systems aim to encourage the involvement of citizens in local community and national issues, and should guarantee equal civil and political rights for all citizens “as a way to empower people, to give them voices as well as, more broadly, to strengthen social inclusion and cohesion”<sup>6</sup>.

#### *Denmark*

The Danish system provides robust and generous welfare benefits. To prevent people from falling into the so-called “unemployment trap”, i.e. a lack of incentives for the unemployed to take up a job, the Danish system provides high-level educational and vocational training facilities and active programs to help unemployed people acquire new skills. Moreover, the Danish Constitution recognises the right of the individual to receive public assistance when he/she is unable to support him/herself toward this process of requalification. However, the person “shall comply with the obligations imposed by statute in such respect.”<sup>7</sup>

At the same time, “in order to advance the public interest, efforts shall be made to guarantee work for every able-bodied citizen on terms that will secure his existence.”<sup>8</sup> Thus, the right to work is linked to the State’s obligation to reach full employment for all citizens.<sup>9</sup> Therefore, citizens’ right to work requires the State not only to adopt policies aimed at improving the employability of unemployed people, but also at promoting general macroeconomic policies in order to achieve full employment.

Indeed, Denmark chose a “high road” to reach “full employment competitiveness and social welfare”, and this aspect has never been called

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<sup>6</sup> M. Thomson, “Democracy, inclusion and the governance of Active Social Policies in the EU – Recent lessons from Denmark, the UK and France”, *RECON Online Working Paper*, Vol. 27, 2001.

<sup>7</sup> Danish Constitution, Article 75, (2). The duty to be active is also set by the Consolidation Act On An Active Social Policy 2000: Article 1 (2) of the Consolidation Act On An Active Social Policy highlights that “The purpose of providing financial support is to enable recipients to become self-supporting. Therefore, recipients and their spouses are required to apply their best efforts to improve and develop their working capacity, e.g. by accepting offers of employment or activation”. Please, see also: K. Ketscher, ‘The Danish Social Welfare System’ in B. Dahl, T. Melchior, D. Tamm (ed.) *Danish Law in a European Perspective*, Forlaget Thomson GadJura, Copenhagen, 2002, p. 299; K. Ketscher, “Contrasting legal concepts of active citizenship – Europe and the Nordic countries”, in B. Hvinden, H. Johansson (ed.), *Citizenship in Nordic Welfare States – Dynamic of choice, duties and participation in a changing Europe*, Routledge, 2007, p. 143.

<sup>8</sup> Danish Constitution, Article 75, (1).

<sup>9</sup> The right to work in relationship with ALPMs also implies the duty to work; the freedom to work; the freedom to work and the right to choose ‘decent’ work; the freedom to work and right to choose (decent and) ‘suitable’ work; the freedom to work and the right to choose (decent, suitable) ‘rewarding’ work, as in M. Freedland, P. Craig, C. Jacqueson, N. Kountouris, *Public*, p. 225 ff.



into question by any party or by social partners. This “high road” of growth and welfare is based, on the one hand, on strong investment in ALMPs, educational measures such as lifelong learning strategies and vocational training, child care facilities, and other features of the welfare state, and, on the other hand, on high value production.

#### *Spain*

In Spain, the goal of full employment is a legally binding principle.<sup>10</sup> The Spanish Constitutional Court recognizes the obligation of the State to provide interventions to guarantee the effectiveness of citizens’ social and economic rights.<sup>11</sup> The effectiveness of the right to work is crucial to the enforcement of all other constitutionally recognized rights<sup>12</sup>.

Nonetheless, for the first time, this objective was not included in the text of the 2012 Spanish LM reform<sup>13</sup>; it has been replaced by the goal of “employability”, a concept that is more linked to the efforts of the individual to prosecute his/her right to work, rather than to the obligations of the State.

#### *Italy*

The Italian Constitution does not mention full employment as a public goal guaranteeing the right to work for all citizens. However, there are different interpretations of the constitutional “right to work.”<sup>14</sup> One scholarly position, which was particularly strong during the 1980s, sees the right to work as a duty on the part of the State to reach *full employment*.<sup>15</sup> On the other hand, several commentators on the Italian constitution have recently interpreted the right to work as a way of increasing citizens’ *employability* and enforcing activation duties, rather than reinforcing the State’s duty to reach full employment.<sup>16</sup> Thus, perspectives on the State’s role are moving from a vision of the State’s duty to provide full employment to a duty to provide individuals with PES to make them “employable,” i.e. ready to be employed in the LM. It may therefore be said that “unemployment” is losing its collective dimension and coming to be perceived as a consequence of an

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<sup>10</sup> J. Aparicio Tovar, “La Unión Europea no tiene competencia para imponer a España la política económica actual”, in *Anuario, Fundación 1º De Mayo*, Ed. Bomarzo, Albacete, 2011, p. 118.

<sup>11</sup> STC 18/1984, *Tribunal Constitucional, sentencia 18/1984, de 7 de febrero*.

<sup>12</sup> J. L. Monereo Pérez, *La protección de los derechos fundamentales. El modelo Europeo*, Ed. Bomarzo, 2009; J. Aparicio Tovar, “La continuidad de una política de empleo flexibilizadora en la reforma laboral del 2010”, in A. Baylos Grau (ed.), *Garantías de empleo y derechos laborales en la Ley 35/2010 de Reforma Laboral*, Ed. Bomarzo, 2011.

<sup>13</sup> *Real Decreto Ley* n. 3/2012.

<sup>14</sup> Italian Constitution, Article 4.

<sup>15</sup> For example: G. F. Mancini, “Sub art. 4”, in G. Branca (ed.), *Commentario della Costituzione*, Zanichelli, Il Foro italiano, 1975; G. G. Balandi, *Tutela del reddito e mercato del lavoro nell’ordinamento italiano*, Giuffrè, 1984).

<sup>16</sup> E.g.: C. De Marco, “Gli ammortizzatori sociali tra vecchie e nuove proposte”, *Rivista italiana di diritto del lavoro*, Vol. 4, 2009, pp. 555-594; R. Garofalo, “Ammortizzatori sociali e occupabilità”, *Diritto delle relazioni industriali*, Vol. 3, 2006, pp. 671-689.

individual lack of will to be active. This tendency can be highlighted in the Spanish system, too.<sup>17</sup>

At the same time, as Lambertucci highlights,<sup>18</sup> in Italy, the principle of substantive equality obliges the State to create conditions for active participation by citizens in economic, social and political life<sup>19</sup>, by removing those obstacles of an economic or social nature that limit the freedom and equality of citizens. Thus, the right to work should also be linked to this goal.

The picture regarding conditionality and its relationship with unemployment seems to be quite complex, entailing the need for pro-active behaviour both by the unemployed and by the States. On one hand, unemployment could be determined by either (or “both”) the inactive behaviour of the person or (or “and”) by his/her inadequate professional profile. In this case, to prove that the person is not voluntarily unemployed, it is necessary that he/she complies with specific activation duties. On the other hand, unemployment could also depend on the lack of adequate national macroeconomic policy. On this view, individuals are not enabled to enjoy their right to work. Thus, this perspective makes the picture more complex and not reducible to a contract concerning social rights.

At the same time, “social rights rest on the idea that they are the counterpart of the person’s membership of society or, in the case of unemployment insurance, of the prior integration of its members in a community based on solidarity”.<sup>20</sup> Thus, a *contractualization* approach might be considered limited, because it does not focus enough on the States’ duties to achieve full employment and to guarantee the effectiveness of the right to work.

Furthermore, the right to be protected in case of unemployment is acknowledged by the Constitutions of the three MSs under analysis, and is not presented as the *quid pro quo* of a contract.<sup>21</sup> Rather, it can be linked to the duty and right to be active in order to be part of society, and to be enabled to participate in economic, political and social life. At the same time, it also entails a State’s obligation to provide protection against unemployment through benefits and adequate macroeconomic policies geared toward full employment.

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<sup>17</sup> J. L. Monereo Pérez, *La protección de los derechos fundamentales. El modelo Europeo*, Ed. Bomarzo, 2009.

<sup>18</sup> P. Lambertucci, “Il diritto al lavoro tra principi costituzionali e disciplina di tutela: brevi appunti”, *Rivista Italiana di Diritto del Lavoro*, Vol. 1, 2010, p. 91 ff.

<sup>19</sup> Article 3 Italian Constitution.

<sup>20</sup> M. Freedland, P. Craig, C. Jacqueson, N. Kountouris, *Public*, p. 341.

<sup>21</sup> K. Ketscher, “Contrasting”, p. 146.

### 3. The *contractualization* of the social rights process

As mentioned, the *contractualization* of social rights was introduced to Europe by the Thatcher Government through the NPM.

Such *contractualization* reflects the transition from welfare to workfare systems and growing pressure to reduce the public deficit. According to Hyman, such a process is developing, with EU support, toward a “work first approach”.<sup>22</sup>

At the end of the 1990s, the EU began to champion the need for modernization of MSs’ social protection systems, as well as the transition from passive to active measures to prevent unemployed individuals from falling into the unemployment trap.<sup>23</sup>

The Presidency Conclusions of the Lisbon European Council of 23 and 24 March 2000 set a “new strategic goal for the next decade: to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion”<sup>24</sup>. To achieve this objective, the EU started to promote an overall strategy that included the modernization of the European social model, investment in people, and the fight against social exclusion.

As for the modernization of the social model, MSs’ systems “need to be adapted as part of an active welfare state to ensure that work pays”. At the same time, the concept of “employability,” i.e. the goal of making people employable in the LM, started to be mentioned as a crucial factor to be considered in the development of ALMPs.

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<sup>22</sup> R. Hyman, “Labour, Markets and The Future of ‘Decommodification’,” in O. Jacobi, M. Jepsen, B. Keller, M. Weiss (eds.), *Social embedding and the integration of markets: An opportunity for transnational trade union action or an impossible task?*, Hans-Böckler-Stiftung, No. 195, 2007, <http://hdl.handle.net/10419/116441> (last accessed, 02/03/2017). See also: R. Hyman, “Il futuro del principio ‘il lavoro non è una merce’ tra mercato e stato sociale”, *Diritto delle Relazioni Industriali*, No. 4, 2007, p. 988 ff.

<sup>23</sup> Modernising and Improving Social Protection in Europe, COM (97) 102 final, 12.03.1997; Extraordinary European Council Meeting on Employment, Luxembourg, 20 and 21 November 1997 Presidency Conclusions; Council Resolution of 22 February 1999 on the 1999 Employment Guidelines, A Concerted Strategy for Modernising Social Protection, COM (99) 347 final, 14.07.1999.

The unemployment issue, together with the ‘welfare without work’ systems, brought the European Employment Strategy to replace “the focus on demand side policies with the adoption of *supply* side policies... focusing in particular on active labour market policies such as training, work practice, and lifelong learning” in C. Barnard, *EU Employment Law*, Oxford University Press, 2012, p. 22, 23

<sup>24</sup> Presidency Conclusions of the Lisbon European Council of 23 and 24 March 2000. The unemployment issue, together with the ‘welfare without work’ systems, brought the European Employment Strategy to replace “the focus on demand side policies with the adoption of *supply* side policies... focusing in particular on active labour market policies such as training, work practice, and lifelong learning” in C. Barnard, *EU Employment Law*, Oxford University Press, 2012, p. 22, 23

At the beginning of the new millennium, Denmark, Italy and Spain adopted reforms that started to move toward an increasing connection between unemployment benefits and activation obligations, as did other MSs. However, before mentioning such reforms, I will sketch a brief introduction of the three systems in order to elucidate their main characteristics and of the protection they provide in case of unemployment. Indeed, the aforementioned normative changes have affected the MSs under consideration in different ways, depending on the specific features of their respective systems.

### 3.1. Protection in case of unemployment

#### *Denmark*

Protection of unemployed persons in Denmark is robust and is based on two levels: the assistance level – means-tested cash-benefits administered by the municipalities, funded through general taxation, and based on principles of equality and redistribution<sup>25</sup> – and the insurance level, based on unemployment insurance provided by insurance funds (Ghent-system<sup>26</sup>).

The system is also characterized by what is known as Danish *flexicurity*, which seeks to mediate between the flexibility requested by companies and the social protection needed by citizens, through a system called the “Danish triangle”, or “golden triangle”. This system makes it easy to “hire and fire”, but at the same time provides strong social security protection, and includes an efficient ALMP.<sup>27</sup> Danish cultural, political and economic characteristics are relevant to the success of the Danish system, too.<sup>28</sup>

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<sup>25</sup> Website of the Danish Ministry of Social Affairs, <http://english.sm.dk/international/introduction/Sider/Start.aspx>

<sup>26</sup> B. Holmlund, “Unemployment Insurance in Theory and Practice”, *The Scandinavian Journal of Economics*, Vol. 100, 1998, pp. 113–141; K. Madsen, “Activation Policy in Denmark”, Centre for Labour Market Research, Aalborg University, Denmark, Paper for presentation at conference on activation policy, Korea Labor Institute, Seoul, 2009, p. 4.

<sup>27</sup> K. Madsen speaks about a “hybrid model” that “manages to reconcile the dynamic forces of the free market economy with the social security of the Scandinavian welfare state”, see above K. Madsen, “Activation Policy in Denmark”, p. 15. The “golden triangle” would be a “third way” between strong job protection and deregulation, in A. Tangian, “Not for bad weather: flexicurity challenged by the crisis”, *ETUI Policy Brief, European Economic and Employment Policy*, Vol. 3, 2010, p. 2. See also, e.g.: H. Jørgensen, “Flexible labour markets, workers' protection and the security of the wings: A Danish flexicurity solution to the unemployment and social problems in globalized economies?”, *Cepal – Serie Macroeconomía del desarrollo*, Vol. 76, 2009, p. 22; J. Hendeliowitz, “Danish Employment Policy, National Target Setting, Regional Performance Management and Local Delivery,” Employment Region Copenhagen & Zealand, 2008, [www.oecd.org/dataoecd/13/53/40575308.pdf](http://www.oecd.org/dataoecd/13/53/40575308.pdf), (accessed 1/7/2016); K. Madsen, “The

### *Spain*

In the case of unemployment, the Spanish system guarantees two levels of protection: the contributory and the non-contributory. Both are available to unemployed persons who have already worked and paid national insurance. Additionally, there is a form of social assistance, administered by the *municipalidad*, for people who are not eligible for other forms of social protection.<sup>29</sup> In the last decade, legislation that strengthens the ALMPs has been adopted, but their effectiveness is still considered inadequate to cope with the LM's needs.

### *Italy*

In Italy, unemployed people who have already worked can apply for social insurance benefits if they meet the eligibility requirements. The body of legislation in the field is stratified, i.e. unemployment benefits and activation policies for the unemployed are characterized in Italy by an excessive production of law.

Over the years, eligibility requirements have been progressively expanded. Recently, a new assistance level has been introduced: the “*reddito di inclusione*” (ReI). This is a general assistance scheme to tackle poverty, and provides for up to € 485 per month, tied to individualized activation measures, as well as measures targeted at social inclusion and integration into the LM. The ReI entitlement period is limited to 18 months: reinstatement of the benefit is possible after six months of discontinuation, for a period not exceeding 12 months.<sup>30</sup>

## **3.2. Reforms toward contractualization**

### *Denmark*

Denmark began to adopt a policy of tightly linking unemployment benefits and activation duties in the 1990s, when it implemented its model, known all over the world as a successful example of LMP, focused on vocational training and on tailored-made initiatives to empower the unemployed.

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Danish model of 'flexicurity': experiences and lessons”, *Transfer: European Review of Labor and Research*, 2004.

<sup>28</sup> A. Tangian, “Not for bad weather”, p. 75; K. Madsen, “Activation Policy in Denmark”, p. 17; K. Madsen, “Flexicurity in Danish – A Model for Labour Market Reform in Europe?”, *Intereconomics*, Vol. 43, Iss. 2, 2008; G. Färm, H. Jørgensen, P. Palshøj, “Nordicmodel.info: The story of active societies based on welfare and justice”; P. Flaschel, A. Greiner, S. Luchtenberg, “Labor Market Institutions and the Role of Elites in Flexicurity Societies”, *Review of Political Economy*, Vol. 24, n. 1, 2012, pp. 103-129, see in particular p.104.

<sup>29</sup> J. F. Blasco Lahoz, J. López Gandía, *Curso de seguridad social*, Tirant lo Blanch, Valencia, 2017.

<sup>30</sup> Legislative Decree 15 September 2017, n. 147.

Yet, in 2003, things began to change. The Danish Government adopted the *More people into employment 2002 (Flere i Arbejde)* reform: educational schemes were reduced by 50 per cent and a *work first approach* was adopted, with knock-on effects on the traditional Danish activation system.<sup>31</sup>

Legislation started to be oriented toward increasing *contractualization* in a punitive sense, i.e. by fostering sanctions and scaling up the duty to accept any job, through the concept of “suitable” job offer, which reduced the ability of an unemployed person to refuse a job offer.

Such legislation, in force since 2012, has reduced unemployment benefits, tightened eligibility requirements and introduced stricter obligations in terms of activation, orienting the system toward a form of “meaningless activation”<sup>32</sup>, i.e. an activation policy which requires the unemployed person to accept any, first-available job.

#### *Spain*

In 2002, a new Spanish regulation introduced obligations to be active – to attend courses and to accept job offers – through an agreement between the PES and the unemployment benefits beneficiary (i.e. the *compromiso de actividad*, *Ley n. 45/2002*). A 2012 Royal Legislative Decree<sup>33</sup> also underlined the relevance of activation measures as conditions to enable people to become employable, and downsized the role played by macroeconomic policies in tackling unemployment. In the same year, a law<sup>34</sup> was adopted both to address undeclared work and to fight the eventual abuse of unemployment benefits.

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<sup>31</sup> The Act No. 1036 of 2002 amended the Active Employment Market Policy Act (No. 54 of 2001) and specified the duties for unemployed persons to accept offers by the employment service; rules on individual progress contacts between job seekers and the employment service; etc. Moreover, the Active Employment Contributions Act No. 419 of 2003 specified rules on possible offers available by employment service and municipality; job plans; appointment with job allocation; rights and obligations for beneficiaries of unemployment benefits; etc. Last regulation in the field on active employment *Bekendtgørelse af lov om en aktiv beskæftigelsesindsats*, No. 1342 of 21/11/2016, Active employment Act. Specific duties are also set for beneficiaries of insurance unemployment benefits (*Bekendtgørelse af lov om arbejdsløshedsforsikring*, No. 784 of 21/06/2017, Unemployed Insurance Act) or assistance *Bekendtgørelse af lov om aktiv socialpolitik*, No. 269, 21/03/2017, Active Social Policy Act).

<sup>32</sup> J. G. Andersen, “Denmark: ambiguous modernization of an inclusive unemployment protection system”, in J. Clasen and D. Clegg (ed.), *Regulating the risk of unemployment*, Oxford University Press, 2011, pp. 187-207.

<sup>33</sup> *Real Decreto Ley n. 3/2012*.

<sup>34</sup> *Ley n. 13/2012*.

### Italy

Since the beginning of the last century,<sup>35</sup> unemployment benefits have been linked to activation duties, but it is particularly since the beginning of the new millennium that a trend toward *contractualization* of unemployment benefits has been witnessed.

The Italian reform of 2000<sup>36</sup> linked the *status* of unemployed person to the signing of a declaration obliging the unemployed person to be “active”. Only by signing this document could the person access employment services and, eventually, unemployment benefits. In addition, the unemployed person and their employment office may have signed a contract of sorts stating the parties’ mutual obligations (i.e. the *patto di servizio*). Recent legislation is also oriented in the same direction.

In 2012, Italy adopted a labour law reform<sup>37</sup> concerning several aspects of the LM and employment contracts: more emphasis was placed on the obligations of the unemployed, and requirements to be met in order to retain unemployed status became tighter, while the *patto di servizio* became compulsory through the 2015 Renzi reform.<sup>38</sup>

## 4. Contractualization and LM actors

The *contractualization* of social rights approach, i.e. the approach that sees social rights as a kind of *quid pro quo* or contract between the public administration and citizens, has influenced legislative developments in the MSs under analysis. This approach seems to have affected the roles of specific LM actors, too, such as PESs and social security institutions, work agencies, and social partners. In order to highlight how these roles have begun to change, I will consider: (1) recent administrative reforms and their effects on the organisation of employment services; (2) the increasing tendency to create job centres, which can manage both unemployment benefits and activation measures; (3) a “management by objectives” approach in employment offices; (4) the role of social partners; and (5) the role of private actors in the research field under analysis.

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<sup>35</sup> In particular, this was set since the *Regio Decreto Legge* n. 2270/1924: F. Liso, “Part time, disoccupazione e ammortizzatori sociali”, in C. Lagala (ed.), *Part time e disoccupazione nella riforma degli ammortizzatori sociali* Giuffrè, 2004, p. 21.

<sup>36</sup> *Decreto Legislativo* n. 181/2000.

<sup>37</sup> *Legge* n. 92/2012.

<sup>38</sup> *Art. 20 Decreto legislativo* n. 150/2015.

#### 4.1. Administrative law reforms and effects on the organisation of employment services

##### *Denmark*

Since the 1960s, relevant training reforms for skilled and semi-skilled workers have been implemented in Denmark. Additionally, in 1969, the Public Employment Service (*Arbejdsformidlingen, or AF*)<sup>39</sup> was created to better facilitate job matching.

The 1993/1994 reform set up a National Labour Board with Ministerial control and Regional Labour Market Boards to define target groups and activation tools and to establish the goals to be achieved by the *AF*.<sup>40</sup> During this period, the PES worked to provide tailor-made initiatives to the unemployed.

As mentioned above, the 2003 “More people into employment” reform introduced a “work first approach” to Danish ALMPs, very different from the previous system, which had instead been focused on empowering the unemployed through professional skills.

Such an approach has also been influenced by the way in which municipalities are financed: In fact, municipalities receive, for each insured unemployed person, “75 per cent reimbursement of the costs for claimants who participate in an activation programme, 50 per cent for claimants who are “passive”, and no subsidy if the unemployed person is not in activation at a time when they are required to be by law. Municipalities thus have a strong incentive to activate people as much as possible, provided they can find cheap solutions, preferably via private providers.”<sup>41</sup> It can be argued that such an approach places the emphasis on economic aspects and cost-cutting rather than on the provision of adequate interventions.

The 2006 administrative reform introduced a one-tier model by creating job centres. The reform also increased LM policy-making competence at the central State level, strengthened the municipalities’ responsibilities, and weakened decision-making power at a regional level.

A new agency was formed in Denmark on 1 January 2014: the Danish Agency for Labour Market and Recruitment focuses on moving people from unemployment and social security benefits into jobs. This Agency aims, further, to retain people in the Danish LM and support recruitment of highly qualified professionals from outside Denmark.<sup>42</sup>

##### *Spain*

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<sup>39</sup> H. Jørgensen, “Flexible labour markets”, p. 39 ff. J. Hendeliowitz, “La riforma dei servizi per l’impiego danesi”, *SPINN, Periodico di informazione e dibattito per i Servizi per l’impiego*, Vol. 5, 2005.

<sup>40</sup> H. Jørgensen, “Flexible labour markets”, p. 44.

<sup>41</sup> J. G. Andersen, “Denmark: ambiguous modernization”, p. 197, 198.

<sup>42</sup> <http://www.sfr.dk/da/English.aspx>



With regard to Spain, in 1978, the INEM (*Istituto Nacional de Empleo, National Employment Institute*) was introduced and became responsible for job intermediation, employment policy, and unemployment benefits. In 1985, the Government promoted ALMPs by linking young people's vocational training to actual job offers. Thus, for the first time, access to employment services was connected with the need to perform "active" individual actions.<sup>43</sup> Until 1998, ALMPs were entirely developed by the State, but this function was then transferred to the *Comunidades Autónomas* (i.e. Regions).<sup>44</sup> In fact, because the administrative procedures of the INEM became over-complicated and extremely bureaucratic, the government decided to begin the decentralization of services previously provided by the INEM.<sup>45</sup> Thus, in 2003, the SPEE (National Public Employment Service)<sup>46</sup>, replaced the INEM.

The SPEE is made up of three bodies: the Sectorial Employment body, the Work Affairs body, and the General Council of the National Public Employment Service. The latter is a tripartite advisory organ that includes social partners.

In the new activation-oriented model, the National Employment System (NES) functions to coordinate the various administrations. The NES is thus constituted by the SPEE and the Public Employment Services of the *Comunidades Autónomas*. Unemployment benefits are managed by the SPEE through its PESSs, whereas activation policies are promoted by the PES of the *Comunidades Autónomas*, in accordance with the National Public Employment Service guidelines.<sup>47</sup> At a local level, the *Diputaciones* or the

<sup>43</sup> L. Gavira, *Integrated approaches to active welfare and employment policies*, European Foundation for Improvement of Living and Working Conditions, 2002. The Act is the *Plan Nacional de Inserción y Formación Profesional*.

<sup>44</sup> F. Rocha Sánchez, "Reflexiones y propuestas para la reforma de las políticas activas de empleo en España" *Estudios De La Fundación, Fundación 1º De Mayo, Centro Sindical de Estudios*, Vol. 42, 2010; A. Martín Valverde, F. Rodríguez, S. Gutiérrez, J. García Murcia, *Derecho del Trabajo*, Ed. Tecnos, 2010, p. 432; S. Del La Casa Quesada, "Políticas activa y políticas pasivas de empleo: la respuesta de la protección por desempleo ante la crisis económica", in S. Del La Casa Quesada, M. R. Vallecillo Gámez (ed.), *Empleo, mercado de trabajo y sistema productivo: el reto de la innovación en políticas de empleo*, Ed. Bomarzo, 2011, p. 215, 216; R. Ballester, "European Employment Strategy and Spanish Labour Market Policies", *Jordasas de Economía Laborar, Working Papers. Department of Economics, University of Giron*, Vol. 14, 2005.

<sup>45</sup> Law n. 53/2003 (*Ley n. 56/2003*). See G. Hernández, "I Servizi per l'occupazione in Spagna: Dall'intermediazione al collegamento tra politiche attive e passive", in C. Lagala, M. D'Onghia (ed.), *Politiche di attivazione dei disoccupati in Europa*, Ediesse, 2010, pp. 241-244.

<sup>46</sup> *Servizio Público de Empleo Estatal*.

<sup>47</sup> O. Homs, NOTUS, *Social and Employment Policies in Spain*, Policy Department A: Economic and Scientific Policy, European Parliament, 2017: [http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/607331/IPOL\\_IDA\(2017\)607331\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/607331/IPOL_IDA(2017)607331_EN.pdf).

*Ayuntamientos* (local)<sup>48</sup> have the authority to develop their own employment policy initiatives, which are funded by the *Comunidad Autónoma*.<sup>49</sup> The 2011 reform<sup>50</sup> sought to guarantee coordination between different levels of LMPs; a Catalogue of Services was issued that aimed to set the range of opportunities available to unemployed people and companies to encourage job creation.

Recently, the Spanish Employment Activation Strategy for 2014-2016 set specific targets to be achieved by the PES. Such initiatives are mainly aimed at young people, the long-term unemployed, and those older than 45. Through the aforementioned Strategy, resources have been consistently devoted to AMLP, and PESs have started to implement targets through annual plans. Moreover, in March 2015, the vocational training system was reformed in order to strengthen the relationship between passive and active LMPs and to support entrepreneurship.<sup>51</sup>

With regard to the fight against poverty, the main instrument is the Spanish Action Plans for Social Inclusion, introduced in 2006. For the period 2013-2016, the plan aimed to improve coordination at the national level, to provide better social protection, and to link minimum income schemes to participation in ALMP initiatives.

#### *Italy*

In 1997<sup>52</sup>, PESs were decentralized from the national level to the Regions, and employment services were devolved to the district level (*Provincia*).<sup>53</sup> Trilateral Commissions were established at local and regional levels, in the form of advisory boards without decision-making power.<sup>54</sup> In 2001, the Constitution was amended<sup>55</sup> by the reshaping of relationships between national and Regional Constitutional competences in active and passive LMPs. ALMPs were subject to concurrent legislative competence.

<sup>48</sup> M. Á. Malo, “Labour market policies in Spain under the current recession”, *ILO - Discussion Paper Series, International Institute for Labour Studies*, 2011, p. 67.

<sup>49</sup> A. Martín Valverde, F. Rodríguez, S. Gutiérrez, J. García Murcia, *Derecho del Trabajo*, p. 432.

<sup>50</sup> *Real Decreto Ley* n. 3/2011.

<sup>51</sup> O. Homs, NOTUS, *Social and Employment Policies in Spain*.

<sup>52</sup> *Decreto Legislativo* n. 469/97.

<sup>53</sup> M. Napoli, “Disegno di legge delega e modifiche al Titolo V della Costituzione”, *Diritto delle Relazioni Industriali*, Vol. 3, 2002, pp. 361-368. See in particular p. 365. Please, see also P. Varesi (ed.), *I servizi per l'impiego. Un nuovo ruolo delle strutture pubbliche nel mercato del lavoro*, F. Angeli, 2000; F. Carinci, “I due volti della riforma: regionalizzazione e privatizzazione”, *Quaderni di Diritto del Lavoro Relazioni Industriali*, n. 22, 1999, p. 3; V. Fili, *L'avviamento al lavoro tra liberalizzazione e decentramento*, Klueva-Ipsa, 2002.

<sup>54</sup> D. Gottardi, F. Guarriello (ed.), M. Roccella, *Manuale di diritto del lavoro*, Giappichelli, 2015.

<sup>55</sup> *Legge Costituzionale* n. 3/2001.

Concerning ALMPS, in particular, unemployment benefits conditionality and punitive aspects were tightened in 2012<sup>56</sup>. At the same time, a “basic level of services” was introduced: these services were defined as those employment services to be provided in all the territory of the state to ensure a minimum standard of services. This minimum standard was to be common to each Region, even if it could be improved by each of them. However, a lack of resources devoted to reaching this goal makes this basic level difficult to achieve.<sup>57</sup>

The 2015 reform<sup>58</sup> introduced a new agency for managing the ALMPs: the National Agency for Activation policies (*Agenzia Nazionale per le Politiche Attive del Lavoro*, ANPAL). ANPAL coordinates the ALMPs across the country and, in particular, a services network for employment policies.

#### **4.2. Increasing tendency to create job centres that can manage and provide both unemployment benefits and activation measures**

##### *Denmark*

As already mentioned, the 2007 Danish administrative reform introduced, in effect, a different administrative framework for employment policies:<sup>59</sup> Public Employment Offices were replaced by “small job centres with a hybrid character.”<sup>60</sup> The new job centres carry out functions that were previously executed by the municipalities and by the PESs.

Job centres are to guarantee access to unemployment services to all citizens, both ex-workers who have paid national insurance contributions and people who have never contributed. Moreover, uninsured unemployed people apply for both employment services and unemployment benefits at job centres, at the municipal level. This new setup, implemented in August 2009, replaced the previous two-tier system with one tier only. However, different conditions for those who have paid insurance contributions and for those who have not continue to determine an unemployed person’s eligibility in terms of both the type of benefit and the range of activation programs available.<sup>61</sup>

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<sup>56</sup> The so-called Monti Fornero reform, i.e. the *Legge* n. 92/2012.

<sup>57</sup> P. Pascucci, “Servizi per l’impiego, politiche attive, stato di disoccupazione e condizionalità nella legge n. 92 del 2012,” *Rivista del diritto della sicurezza sociale*, No. 3, 2012, p. 543–511.

<sup>58</sup> The so-called Renzi reform, i.e. the *Legislative Decree* n. 150/2015.

<sup>59</sup> *Strukturreformen*, 1.1.2007.

<sup>60</sup> H. Jørgensen, “Flexible labour markets”, p. 45.

<sup>61</sup> K. Madsen, “Activation Policy in Denmark”, p. 4.

#### *Spain*

In Spain, the SPEE is responsible for paying unemployment benefits, while the PESs of the *Comunidades Autónomas* are responsible for promoting activation policies. Despite their different assignments, they provide their services through the same offices, and their staff-members work together on the basis of collaboration agreements. Coordination is guaranteed through networking, supervised by the National Public Employment Service.

#### *Italy*

In Italy, the previous project of the 2012 reform envisaged that INPS could provide both activations services and unemployment and other benefits. But this proposal was then abandoned and, as mentioned, above, a new agency was created. Regulation was then introduced to better coordinate PESs and INPSs, and the new Agency is now charged with supporting and strengthening such aims.

### **4.3. “Management by objectives” (MbO) in employment services**

#### *Denmark*

The aforementioned 2007 Danish administrative reform introduced a new approach to the management of employment measures, oriented toward supporting job centres and ensuring accountability by means of new planning and monitoring tools, such as: performance audit; strategies to help fulfil national and local authority employment objectives that indicate targets, define measures and interventions, and set resources; analysis of job centre outcomes carried out by the Regions; and an official web portal, the *jobindsats.dk*, for unemployed people to search for jobs. These measures are carried out on the basis of indications from the government administration. According to Jørgensen, Baadsgaard and Nørup, the introduction of such a benchmarking approach wasn’t accompanied by any political debate on choosing or developing the selected objectives. Therefore, in their opinion, the reform paid little attention to concepts such as justice, quality, and accessibility.<sup>62</sup>

It is also important to point out potential obstacles in implementing the reform: former PESs (*Arbejdsformidlingen*, or ‘AF’) and local authority administrators come from very different backgrounds and legislative

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<sup>62</sup> H. Jørgensen, D. Baadsgaard and I. Nørup, “From learning to steering – NPM-inspired reforms of the famous Danish labour market policy illustrated by measurement and organizational recalibration in the employment system”, CARMA, Aalborg University, Denmark, Paper for the conference “Welfare States in Transition: Social Policy Transformation in Organizational Practice”, Chicago, 15-16, May 2009, p. 15.

environment, yet are now expected to work collaboratively on local initiatives in 91 different local areas.<sup>63</sup>

#### *Spain*

The “*management by objectives*” (*MbO*)<sup>64</sup> approach has also been adopted by the PES in Italy and Spain, but are yet to demonstrate significant improvements in the quality of services. In fact, despite the setting of objectives and the implementation of specific web portals and data bases, etc., investments in ALMPs in these MSs have long been insufficient, and activation initiatives are relatively ineffective in terms of job placement or enhancement of unemployed persons’ job profiles<sup>65</sup>. Yet, at least in Spain, significant recent investment has been devoted to training activities and employment incentives: in 2015, for example, a new Programme for Employment, Training and Education (POEFE) was adopted and allocated a € 3 billion total budget.<sup>66</sup>

From an administrative perspective, a potential obstacle to reach effectiveness in ALMPs in Spain can be seen in the fact that SPEE employees come from the INEM and must adapt themselves to a different approach to carrying out their functions in order to provide the services mentioned in the so-called Catalogue of Employment Services. This catalogue, which defines the specific responsibilities and functions of the different offices, was introduced in 2001.

All the aforementioned changes shaped a different approach in LMP. Nevertheless, the process of changing the approach of PES staff-teams may take many years: INEM employees were used to a hands-off bureaucratic approach, substantially different from that required by those now working for SPEE to promote and implement the new activation policies.

#### *Italy*

In Italy, the concept of employment services was introduced as a standard by the 1997 administrative reform.<sup>67</sup> The PES directors had to adapt their workforces to the new, less-bureaucratic functions<sup>68</sup>: activation policy emerged as a crucial issue from an outplacement perspective, and from the

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<sup>63</sup> H. Jørgensen, *Arbejdsmarkedspolitikken fornyelse – Innovation eller trussel mod dansk flexicurity?*, LO og FTF København, 2007, p. 50.

<sup>64</sup> M. Freedland, P. Craig, C. Jacqueson, N. Kountouris, *Public*, p. 60.

<sup>65</sup> See [http://epp.eurostat.ec.europa.eu/cache/ITY\\_OFFPUB/KS-DO-12-001/EN/KS-DO-12-001-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-DO-12-001/EN/KS-DO-12-001-EN.PDF) and [http://epp.eurostat.ec.europa.eu/statistics\\_explained/index.php/Category:Labour\\_market](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Category:Labour_market)

<sup>66</sup> O. Homs, NOTUS, *Social and Employment Policies in Spain*, p. 10.

<sup>67</sup> *Decreto Legislativo n. 469/1997*.

<sup>68</sup> *Decreto Legislativo n. 469/1997* (the so-called Legge Bassanini). Please, see M. Rosano, “Prospettive di restyling per la gestione del mercato del lavoro”, in M. Cinelli, G. Ferraro, *Lavoro, competitività, welfare, Commentario alla legge 24 dicembre 2007, n. 247 e riforme correlate*, Utet, 2008, p. 9-28, in particular p. 11.

perspective of integration with passive policy. The 2012 reform<sup>69</sup> highlighted the need to strengthen the link between active and passive LMP and to monitor both the unemployment benefit beneficiaries and the PESs in complying with their duties.

The Renzi Government attempted to amend the constitutional rule concerning regional and national competences in the LM. However, the proposed amendment failed when put to referendum.

According to the Renzi proposal, the Regions would have received exclusive competences (i.e. no more concurrent legislative competence) in specific fields (regional organization of services for companies, professional vocational training, etc.) and the State would have retained the “*tutela e sicurezza del lavoro*”, including competence regarding PESs. In this way, the State would have held primary responsibility for this area of policy.

The most interesting aspect of the proposal would have been the ability of the State to delegate its competences to the Regions in order to support them. In fact, worth noting is the non-homogeneity of services in the LM provided by the PESs within the national territory; the considerable regional and municipal differences are evidenced in the coexistence of examples of best practice and of inefficiency.<sup>70</sup>

Without the approval of the 2017 Constitutional reform, which was based on several very diverse matters and not just on the one discussed here, the introduction of the new national Agency cannot properly find the right legislative framework to play a relevant role in coordinating the ALMP.

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<sup>69</sup> Legge n. 92/2012.

<sup>70</sup> F. Liso, “Brevi appunti sugli ammortizzatori e sui servizi all’impiego nel Protocollo del 23 luglio 2007”, in A. Perulli (ed.), *Le riforme del lavoro. Dalla legge finanziaria 2007 al protocollo sul Welfare*, Halley Editrice, 2007; A. Alaimo, *Il diritto sociale al lavoro nei mercati integrati. I servizi per l’impiego tra regolazione comunitaria e nazionale*, Giappichelli, 2009; F. Liso, Servizi all’Impiego, in *Enciclopedia Giuridica Treccani*, 2007, pp. 1-10; etc.

On the non-homogeneity of the employment services: Indagine sui servizi per l’impiego. Rapporto di monitoraggio, 2013. Ministero del Lavoro e PS, Studi e Ricerche sul Mercato del Lavoro, in *Lavoro/Documents/Rapportomonitoraggio SPI 2013.pdf*, (accessed 1st October 2016).

#### 4.4. Progressive weakening of the social partners' role: LM policymaking and management

##### *Denmark*

Danish trade unions and employers' associations have traditionally played a crucial role in LM policymaking due their long-term relationships based on co-determination and collaboration (among other things).<sup>71</sup>

However, from 2007 onward, things appear to have changed. Some experts see the aforementioned 2007 Danish administrative reform as "a means of consolidating and further improving the level of welfare in Denmark."<sup>72</sup> At the same time, others interpret it as a way to disempower the regions and strengthen local council administrations and, at the same time, to weaken social partners' role in the LM.<sup>73</sup>

In recent years, legislation has increased the role of the Danish "*a-kasserne*", or unemployment insurance funds, in managing ALMP. In particular, they have to manage and offer, to their members, particular employment services such as job orientation activities, job-matching services and frequent interviews to check the availability to work of the unemployed.<sup>74</sup>

##### *Spain*

In 2012, the newly-elected Spanish government adopted a Royal Legislative Decree<sup>75</sup> that affected the regulations on industrial relations, collective dismissal, and collective bargaining. This reform was adopted without Trade Union involvement, and without heed to the recommendations of an agreement signed by the social partners no more than 20 days before.<sup>76</sup> This made clear the government's *modus operandi* of excluding social partners from the discussion on labour matters.

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<sup>71</sup> H. Jørgensen, "Flexible labour markets", p. 18 ff. The "September compromise" was achieved as a consequence of a general strike in 1899; K. Madsen, "Flexicurity in Danish – A Model", p. 75.

<sup>72</sup> J. Hendeliowitz, "Danish Employment Policy", p. 11.

<sup>73</sup> H. Jørgensen, M. Schulze, "Leaving the Nordic Path? The changing role of Danish Trade Unions in the Welfare Reform Process", *Social Policy and Administration*, Vol. 45, No. 2, 2011.

<sup>74</sup> H. Jørgensen, D. Baadsgaard and I. Nørup, "From learning to steering", p. 8. J. G. Andersen, "Denmark: ambiguous modernization", p. 194.

<sup>75</sup> *Real Decreto Ley n. 3/2012*.

<sup>76</sup> A. Baylos Grau, "El sentido general de la reforma: la ruptura de los equilibrios organizativos y colectivos y la exaltación del poder privado del empresario", *Revista de Derecho Social*, Vol. 57, 2012, pp. 9-18, 10; M. E. "Baamonde, Rodríguez-Piñero, M. Bravo-Ferrer, F. Valdés Dal-Re, 'La nueva reforma laboral', *Relaciones Laborales*, N. 5, 1/15, 2012.

### *Italy*

In Italy, the 2001 White Paper<sup>77</sup> suggested increasing participation of the social partners in the provision of unemployment benefits through the “*enti bilaterali*”, or bilateral entities, which are made by companies’ and workers’ delegates and funded by both companies’ and workers’ contributions. These entities may manage both passive and active policies and are particularly effective in the handicraft sector. No attention was given, however, to creating the conditions for effective participation of the social partners in LM policy-making, especially in respect of trade unions.

In 2007, a trilateral agreement known as the Welfare Protocol was signed by the Government, the trade unions and the employers’ associations. Part of this trilateral agreement was implemented through law:<sup>78</sup> the duration of unemployment benefits was extended, and bilateral entities (trade unions – employers’ associations) could play an integrative role in social security provision.

Through bilateral entities, or in other ways (i.e. the creation of specific bilateral funds), the 2012 reform has provided financial support in case of temporary lack of work to workers who work in companies with 15 employees or more and who cannot access other means of national financial support (such as the *Cassa Integrazione Guadagni*). According to Renga, in this way, the 2012 reform allow for the transfer of a part of the duty of social protection from the State to private actors.<sup>79</sup>

The legislative debates on both the 2012 and 2015 reform on LM were characterized by weak involvement on the part of social partners.

## **4.5. Increasing role of private actors in the management of employment services**

### *Denmark*

As of the 2007 reform, job centres in Denmark are free to enter into agreements with private actors in order to support them in carrying out their

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<sup>77</sup> *Libro Bianco sul mercato del lavoro in Italia. Proposte per una società attiva e per un lavoro di qualità*. The 2001 Italian White Paper of 2001 was commissioned by the Italian Ministry of Labour and Social Policy on the Italian labour market. It proposed a concept of “active society”. Please, see M. Biagi, C. Dell’Arling, N. Forlani, P. Reboani and M. Sacconi, “White Paper on the Labour Market in Italy. Proposal for an Active Society and Quality Employment”, in R. Blanpain (ed.), *White Paper on the Labour market in Italy, The Quality of European Industrial Relations, and Changing Industrial Relations*, In Memoriam Marco Biagi, Bulletin of Comparative Labour Relations 44, Kluwer Law International, 2002, pp. 1-177.

<sup>78</sup> Legge n. 247/2007.

<sup>79</sup> S. Renga, “La ‘riforma’ degli ammortizzatori sociali”, 3-4 *Lavoro e Diritto*, Vol- 3-4, 2012, pp. 621-642, 636.



tasks. Since 2010, local authorities have been responsible for the payment of unemployment insurance benefits. In particular, municipalities receive funds from the State on condition they meet specific performance indicators.<sup>80</sup> This trend can also affect the involvement of private actors in providing employment services in the LM and orient the services they offer toward a work-first approach.

#### *Spain*

Even in Spain, job intermediation has started to play an increasing role in LMP. Both public and authorized private bodies provide intermediation services: in particular, in 2003, regulations<sup>81</sup> expressly considered private bodies to be key elements of employment policies aiming at full employment. The PESs of the *Comunidades Autónomas* had the authority to determine the conditions for collaboration with private agencies that carry out employment intermediation and manage overall policy for activation. Regarding active and passive LMPs, the 2010 LM reform<sup>82</sup> opened up the possibility for private bodies to provide different services; not just temporary work, outsourcing, recruitment, assessment, training and development, career management and workforce consulting, but also “labour market intermediation”, in order to intercede between job seekers and employers.<sup>83</sup>

#### *Italy*

In 1997, the public monopoly over employment services was abolished in Italy, employment intermediation was opened up to private actors, employment services were decentralised, and active and passive LMPs started to be integrated with each other.<sup>84</sup> The same year, the so-called “Treu Package”<sup>85</sup> made the LM participation of private actors possible by abolishing the prohibition on providing labour through intermediaries.

The 2001 reform<sup>86</sup> strengthened the work agencies’ role in the LM, allowing them to carry out employment intermediation and be involved in the provision of labour, as well as in other activities such as the recruitment of workers. Emphasis was placed on the work agencies’ potential role in

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<sup>80</sup> J. G. Andersen, “Denmark: ambiguous modernization”, p. 197, 198.

<sup>81</sup> *Ley n. 56/2003*.

<sup>82</sup> *Ley 35/2010*.

<sup>83</sup> C. Chacartegui Jávega, “La Actuación de las empress de trabajo temporale como agencias de colocación. La crisis como pretexto en el avance de la iniciativa privada”, *Revista de Derecho Social*, “*La reforma Laboral*”, Vol. 57, 2012, pp. 71-84; in particular p. 71, 72. The 1994 reform opened the possibility for private agencies to work to deal with employment intermediation. The Law n. 35/2010 abrogated several limitations to temporary work provisions and allowed the employment intermediation to be provided by profit-making organizations.

<sup>84</sup> *Decreto Legislativo n. 469/1997*.

<sup>85</sup> *Legge n. 196/1997*.

<sup>86</sup> *Legge n. 30/2003* and *Decreto Legislativo n. 276/2003*.

improving the LM efficiency. Unfortunately, however, the following years showed the limitations of such an approach.<sup>87</sup>

## 5. Conclusions

Despite significant differences characterizing the Danish, Spanish and Italian systems, similar tendencies and converging developments in the employment and social protection field may be highlighted. A common tendency can be observed in the three MSs toward *contractualizing* unemployment benefits and, at the same time, increasingly monitoring the fulfilment of connected obligations. The increasing *contractualization* of unemployment benefits requires beneficiaries to undertake more and more activation duties and, in the case of non-compliance beneficiaries, to lose their benefits. Thus, stricter activation duties could mean that beneficiaries face a higher risk of losing unemployment benefits (consequently saving the State's money).

PESs have increased their efforts to monitor compliance with activation duties.

At the same time, it is possible to highlight a common and increasing tendency toward the creation of administration or administrative practices – i.e. job centres in Denmark, coordination agreements in Spain, the new Agency in Italy – that provide or coordinate both unemployment benefits and activation measures. At the same time there is also a common, increased focus on the punitive aspect and on controlling possible breaches of law in the course of service provision. In fact, in this way, the provider of benefits may immediately check whether activation duties have been complied with.

The three MSs considered here have adopted administrative law reforms that have affected the organisation of PESs in the inter-relationship between the local and national levels. Delivery of services has been gradually devolved to a local level, whereas the decision-making process that formulates ALMP policy seems to be reverting to the centre. Thus, on the one hand, ALMP management has been decentralized while, on the other hand, policy making in ALMPs is becoming ever more a national competence, and no longer a regional one.

It is also possible to highlight the growing control of services provided by the PESs through “management by objectives”. This process, however, may increase the level of bureaucracy of such organisations, especially if fixed objectives are not related to meaningful indicators in terms of effective quality of services.

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<sup>87</sup> P. A. Varesi, “Il workfare territoriale”, in D. Gottardi, T. Bazzani, (ed.), *Il workfare territoriale*, Ed. Scientifiche Italiane, 2014.

The development of institutions in the field seems to have been conditioned by the *contractualization* idea and by the need to reduce public expenditure. The gradual outsourcing of social protection and activation services shows the new role played by private actors in managing employment services<sup>88</sup>: public-private partnerships have increased in several MSs, “partly as a result of budgetary constraints”<sup>89</sup>. Public administrations may look at private actors, which provide employment services, as a kind of business opportunity, and may outsource a portion of their employment services to these private actors, in order to save money.

Although legislative changes have been introduced in the three MSs within the ALMP, such changes have not always sought to improve the quality of activation initiatives.

Moreover, it is possible to point out a progressive weakening of the role of social partners in LM policy-making, especially of the trade unions. At the same time, in Denmark, the social partners’ role has increased with respect to the monitoring of the availability to work of the unemployed. Meanwhile, in Italy, the role of bilateral entities in providing social security for unemployed people has increased. Thus, trade unions in Denmark are becoming gradually more involved in the monitoring of activation duties, while in Italy they have become more involved in the provision of unemployment benefits, and less involved in LM policy-making.

When considering the Constitutional principles of the MSs, one may question whether: (i) the emphasis on *contractualization* would not risk reduce the ability to enforce the right of protection in the case of unemployment or not; (ii) the right to work would be supported by actual activation policies or not, especially considering the growing *work first* approach; and (iii) the duty to work would be focused on the quality of job (suitability of job offer), in this case offered by employment services to unemployed people, or not.

It is also relevant to point out that in Denmark people may effectively fall into the unemployment trap because of the strong welfare system, while in Italy and Spain this outcome is less likely due to the different and weaker welfare systems. In any case, however, one may postulate that an increasingly punitive approach does not per se address unemployment, which requires, rather, a macroeconomic policy supporting the creation of

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<sup>88</sup> Case C-41/90 Höfner and Elser v. Macroton [1991] ECR I-1979; Case C-55/96 Non-Contentious Proceedings brought by Job Centre Coop. arl [1997] ECR I-7140. See also C. Barnard, *EU Employment Law*, Oxford University Press, 2006, p. 36; S. Sciarra, “Job centre: an illustrative example of strategic litigation”, in S. Sciarra (ed.), *Labour Law in the Courts*, Hart Publishing, 2001, p. 241.

<sup>89</sup> M. Freedland, P. Craig, C. Jacqueson, N. Kountouris, *Public*, p. 98.

jobs, or a redistribution/re-division of the work available between all potential workers.

As mentioned, above, the emphasis on contractualization and punitive aspects, and, therefore, the sanctioning function of LMP, seem to influence the role of the LM actors. In fact, administrative institutions seem not to play a pro-active role in economic development, and thus, in LM shaping linked to specific activities promoting the creation of jobs. Their role is instead focused on strengthening the bond between granting benefits, on one hand, and monitoring activation duties fulfilment, on the other.

However, the goal of full employment, which is recognised by the Treaty on European Union (Art. 3), seems irreducible to the mere enhancement of the employability of the unemployed. Enhancing an individual's employability must focus on high quality activation policies within a framework that guarantees adequate protection in the full range of transitions through the labour market.

## **Coordination and cooperation activities in the labour market**

Tania Bazzani

### **Abstract**

This contribution analyses how the concepts of “C&C” may contribute to the improved functioning of European, national and territorial LMs by exploring the concepts of C&C as it is already in use at the EU level, before moving onto an exploration of its operation at the domestic level.

The concepts of “coordination” and “cooperation” (“C&C”) between different LM actors can be found in the domestic and European legislation. C&C between LM actors can be useful in: (i) aiding job matching, linking the social security system to adequate activations policies, bridging companies’ needs with vocational training initiatives, and integrating national security protections, etc.; (ii) in analysing the resources of different actors across a broad spectrum, in order to plan long-term responses and to coordinate projects; (iii) policy-making in terms of territorial and national growth, especially with respect to public administration, PESs, chambers of commerce and industry, and social partners, etc.; (iv) in mapping existing initiatives and services may be a valid tool to allow C&C between different actors and to plan coordinated policies to support people and their activation. Databases may also constitute an important tool in developing coordination and cooperation, and may thus provide a more informed picture of the LM, as well as of economic and social development in a given territorial area.

### **1. Introduction**

The development of innovative research tools to safeguard the viability of social security systems of EU Member States (MSs) is becoming more and more critical: in this regard, a key role may be played by coordination and cooperation activities at different levels, between actors in the labour market (LM).

This contribution seeks to analyse how the concepts of “coordination” and “cooperation” (“C&C”) may contribute, and how European Employment Services (EURES) is contributing, to the improved functioning of European, national and territorial LMs. In particular, this contribution will explore the concepts of C&C as it is already in use at the EU level, before moving onto

an exploration of its operation at the domestic level. Specifically, concerning this last aspect, I will discuss: (i) the opportunities provided by Italian law in the field under analysis; and (ii) an Italian case study in LM networking at the territorial level.

C&C represent not only a potentially efficient way to sustain social security, but also a means to strengthen the links between, on one hand, benefits and activation initiatives for citizens and, on the other hand, job and training opportunities, while also taking into account working conditions offered by the labour relationship. From this perspective, C&C between LM actors should focus on the person's circumstances both within and outside of the LM.

In this vein, Hugo Sinzheimer's body of work integrated social security in labour law provisions and, in simultaneously moving beyond the traditional distinction between private and public law, he shifted the focus onto the *person* for the first time. Following from Sinzheimer's quest for innovative strategies to ensure *persons* an adequate level of social security protection, the focus should shift from mere social security reforms – often directed toward downsizing expenditure in the field and consequently downsizing services/supports – to new possibilities outside the boundaries of social security law. In this regard, the concepts of C&C represent a valid and useful path for further exploration.

Within the realms of labour and social security law, the concepts of C&C are often mentioned by European Treaties referring to different aspects of employment and social security.<sup>1</sup> Thus, the concepts of C&C can take on different meanings, depending of their specific used in the various Treaties.

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<sup>1</sup> The EU encourages the cooperation between national employment services (Article 46 TEU); the administrative cooperation, e.g., in order to support, coordinate or supplement the actions of the Member States (Article 6 TFEU). The EU shall contribute to a high level of employment by encouraging cooperation between MS and by supporting, and if necessary, complementing their action (Art. 147 TFEU); the European Parliament and the Council may adopt incentive measures to encourage cooperation between MS in the field of employment and social law (Art. 149 TFEU; Art. 153 TFEU); the Commission shall also encourage cooperation between MS and facilitate the coordination and encourage cooperation of their action in all social policy fields (Art. 156 TFEU); the Social Protection Committee should promote cooperation on social protection policies between MS (Art. 160 TFEU); the Union shall encourage the cooperation between MS in education and vocational training (Title XII TFEU and Art. 145 TFEU). Coordination of MS's economic policies should be achieved to reach the Union's objectives. For the same reason, employment policies should be consistent with the broad guidelines of the economic policies of the MS and the Union (Art. 146 TFEU). The Employment Committee promotes coordination between MSs (Art. 150 TFEU) on employment and LM policies. MS shall conduct their economic policies and shall coordinate them in order to develop and strengthen the EU's economic, social and territorial cohesion (Art. 174 TFEU, ff.).

According to the Cambridge Dictionary, “coordination” is “the act of making all the people involved in a plan or activity work together in an organized way” and “cooperation” is “the act of working together with someone or doing what they ask you”.<sup>2</sup>

In this contribution, C&C refer to selected potential coordinative or cooperative interrelationships between LM actors, which may have a positive impact on the LM.

The concepts of “coordination” and “cooperation” between different LM actors can be found in the domestic and European legislation. C&C between LM actors can be useful in aiding job matching, linking the social security system to adequate activations policies, bridging companies’ needs with vocational training initiatives, and integrating national security protections, etc. Coordination and cooperation also make it possible to analyse the resources of different actors across a broad spectrum, in order to plan long-term responses and to coordinate projects.

Moreover, C&C of LM actors can prove crucial to policy-making in terms of territorial and national growth, especially with respect to public administration, PESs, chambers of commerce and industry, and social partners, etc. Such actors may plan a project to aid local development, which may be integrated in various ways, such as labour, education, services, and social protection, etc. Mapping existing initiatives and services may be a valid tool to allow C&C between different actors and to plan coordinated policies to support people and their activation. Databases may also constitute an important tool in developing coordination and cooperation, and may thus provide a more informed picture of the LM, as well as of economic and social development in a given territorial area.

## **2. The European level**

The EU promotes several different kinds of C&C, all of which are focused on the integration of domestic and European administrations. This integration processes are designed to enable the participation of different institutions, and to increase the efficiency of administrations, via (among other things) the use of shared databases.

Decision 93/569/EEC implemented the Council Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community, and specifically introduced the network of services known as EURES.

The EURES network includes public and private partners of the employment services, approved by them and operating under national labour law provisions, who have signed an agreement with the Commission and with

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<sup>2</sup> <https://dictionary.cambridge.org>.

the social and economic partners designated by conventions establishing the cross-border EURES. In this way, EURES integrates private and public actors, as well as national and supranational interests. It is made up of actors linked with the domestic PESs,<sup>3</sup> and is interconnected with the Commission, to which MSs must send data related to LM performance and working conditions, etc.<sup>4</sup>

In accordance with aforementioned Decision 93/569/EEC, the MSs must inform the Commission of problems arising in connection with freedom of movement and employment of workers, and of the development conditions of employment by region and by branch of activity. At the same time, EURES should provide workers with information on vacancies and applications for employment in the other MSs, together with information on living and working conditions. Further, EURES is to promote transnational, interregional and cross-border exchange, whilst also providing transparent information, in order to develop European LMs and make them accessible to all. In this vein, EURES is also to develop methodologies and indicators to monitor and evaluate planned activities, with information to be sent to the Commission on an annual basis.<sup>5</sup>

From the beginning, EURES sought to achieve these goals by, in particular, coordinating the different national public employment services (PESs). It then widened the scope of its operations to include the provision of open and free access, as well as CV data entry, for all workers. Thus, EURES seeks to develop cooperation and the exchange of information, and encompasses the Commission, the employment services of the MSs, and any further national partners they might have.

Within the EURES-network, national PESs are integrated, aiding the development of a system based on reciprocal confidence and loyal collaboration, oriented toward establishing common rules.

This is particularly important as the national PESs play a key role in the implementation of the European Employment Strategy, and MSs are responsible for developing their efficiency and effectiveness.<sup>6</sup> EURES takes

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<sup>3</sup> M. Freedland, P. Craig, C. Jacqueson, N. Kountouris, *Public Employment Services and European Law*, Oxford University Press, 2007, pp. 86, 191 ff.

<sup>4</sup> In particular “central employment services of the Member States shall co-operate closely with each other and with the Commission with a view to acting jointly as regards the clearing of vacancies and applications for employment within the Community and the resultant placing of workers in employment”: Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.

<sup>5</sup> Commission Decision of 23 December 2002 implementing Council Regulation (EEC) No 1612/68 as regards the clearance of vacancies and applications for employment.

<sup>6</sup> In 1996 the Commission created the High Level Panel on Free Movement for Persons, in order to cope with problems affecting the freedom of movement for workers within the Community. In March 1997 the experts of the panel presented about 80 recommendations focused on the role of the EURES network. Consequently, in 1997 the Commission



advantage of digitized technologies (internet, website) that allow access to several databases. At the same time, the PESs of the MSs must improve quality and access to information on job requests and offers, through the implementation of these tools<sup>7</sup>. Indeed, even the Joint Declaration by the Heads of Public Employment Services in the European Economic Area of 1998 had aimed to develop the technological system to become directly accessible to all actors concerned. EURES can therefore be seen as a further development of this goal.

Common databases and integrated IT systems may be valid tools to enable and promote networking among different actors in the LM in order to achieve effective LM policies (LMPs), such as activation measures, several kinds of initiatives in support of unemployed people, and in terms of other supports, etc. Technological integration among all PESs of the MSs has become crucial to achieving efficient and fast communication between them and the EURES database.<sup>8</sup> The goal of integration is undoubtedly challenging, particularly considering the different levels of efficiency among the MSs' PESs. This issue was fundamental to the 2013 Commission's proposal<sup>9</sup> to expand, reinforce and consolidate on-going initiatives between PESs. Such cooperation should also facilitate the implementation of LM projects financed by the European Social Fund (ESF), and the proposed initiative could contribute to improved cost-efficiency.

After almost one year, the proposal became a Decision in 2014,<sup>10</sup> replacing the existing informal advisory group of the European Network of Heads of PES with a formal cooperation-network in order to contribute to the modernization and the strengthening of PES. The full potential value of this network is to reside in the "continued participation of all Member States" within the areas of PES responsibility, encouraging their cooperation in order to contribute to "Europe 2020". This network is to achieve its goals through "benchlearning", i.e. "the process of creating a systematic and

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adopted the Action Plan for Free Movement for Workers, in order to provide a clear and transparent legal framework oriented to increase the efficiency of the European labour market: E. Baldoni, "The Free Movement of Persons in the European Union: A legal – historical overview", *Pioneer Working Paper*, Vol. 2, 2003, p. 10 ff.

<sup>7</sup> Commission Communication 'Modernising public employment services to support the European Employment Strategy', Brussels, 13.11.1998, COM(1998) 641 final.

<sup>8</sup> Memorandum of Understanding between the Public Employment Services of the EEA for the development of the EURES network, 16 November 1998. See also Communication from the Commission, 'Annual Growth Survey 2013', Bruxelles, 28 November 2012 COM (2012) 750 final.

<sup>9</sup> Proposal for a Decision of the European Parliament and of the Council on enhanced cooperation between Public Employment Services, Brussels, 17.6.2013 COM(2013) 430 final.

<sup>10</sup> Decision No 573/2014/EU of the European Parliament and of the Council of 15 May 2014 on enhanced cooperation between Public Employment Services (PES).

integrated link between benchmarking and mutual learning activities, that consists of identifying good performances through indicator-based benchmarking systems, including data collection, data validation, data consolidation and assessments, with appropriate methodology, and of using findings for tangible and evidence-informed mutual learning activities, including good or best practice model”.<sup>11</sup> The Decision also provided for the allocation of specified amounts of funding for the network.

Moreover, the Decision sought to formalise and strengthen informal cooperation between the PESs. In particular, in the previous proposal for the Decision, the Commission expressed the belief that, “a European network of PES established on solid legal ground would be able to increase comprehensively coordinated activities among PES and provide the network with legitimacy to act. A formalised structure can enable the network to contribute to the development of innovative, evidence-based policy implementation measures in line with the Europe 2020 objectives.” Thus, providing the existing informal network with a formal role may make it more effective and efficient. This perspective may be useful insofar as shared purposes and motivations – which the informal network is based on – remain fundamental to the newly formalised structure. Consequently, shared purposes, goals and motivations within a network would be essential to making it operate effectively efficiently.

Regulation (EU) 2016/589 of the European Parliament and of the Council established a framework for cooperation to facilitate the exercise of freedom of movement for workers within the Union by focussing on: (i) the EURES organisation and the functioning of the EURES network, including social partners and other actors (at the domestic level, national coordination offices are responsible for the application of the Regulation in the respective MSs); (ii) cooperation between the Commission and the MSs, with the establishment of a European Coordination Office responsible for assisting EURES in carrying out its activities; (iii) the promotion of initiatives by and between MSs to achieve a balance between supply and demand in the LM by achieving a high level of quality employment; and (iv) the promotion of mobility services for workers and employers, such as the organisation of a common IT platform for listing job vacancies and job applications.<sup>12</sup>

The C&C between LM actors can contribute to enabling MSs to achieve effective employment-policy outcomes. As mentioned, these outcomes can be evaluated through performance indicators. Thus, benchmarking – which was supported by the Treaty of Lisbon and became a tool for implementing

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<sup>11</sup> Art. 2 of the Decision No 573/2014/EU.

<sup>12</sup> Regulation (EU) 2016/589 of the European Parliament and of the Council of 13 April 2016 on a European network of employment services (EURES), workers' access to mobility services and the further integration of labour markets, and amending Regulations (EU) No 492/2011 and (EU) No 1296/2013.

the European employment guidelines – seems to be a pillar of the PES network approach. Nevertheless, benchmarking should not be used to merely track the success of formal objectives according to bureaucratic processes; rather, it should effectively contribute to improving employment policies of the MSs. Moreover, how benchmarks are structured and conceived should be debated by LM actors, including social partners.<sup>13</sup>

Other kinds of C&C in employment policies have also been promoted by the EU, such as economic, social and territorial cohesion (art. 4 TEUF). This policy is included in the Title XVIII of the TEUF and aims at promoting economic and social progress, together with a high level of employment and sustainable development.<sup>14</sup> The 2007 Territorial Agenda, renewed in 2010, noted the need to address spatial inequality and Europe 2020-linked territorial cohesion, with the goal of inclusive growth and the fostering of a high-employment economy.<sup>15</sup>

Over the years, economic, social and territorial cohesion (Article 174 TFEU) policy has adopted a multi-level governance system, made up of different actors with integrated competences. This system has progressively created interactive cooperation networks at the territorial level, composed by European institutions, domestic authorities, companies, and other actors.<sup>16</sup>

In the 1990s, European Institutions looked for innovative solutions in order to cope with increasing unemployment. From this point of view, “the European Council...” welcomed “...the positive reaction to the initiatives on territorial employment pacts and...” encouraged the “... implementation of the 60 projects proposed by the Member States”.<sup>17</sup> These pacts – as field trials – helped facilitate the exploration of local and bottom-up approaches to employment, while beginning also to base their action on multi-stakeholder partnerships at a local level. These partnerships included economic and

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<sup>13</sup> A similar consideration on benchmarking in the LM is provided on its introduction in the Danish system by: H. Jørgensen, D. Baadsgaard and I. Nørup, “From learning to steering – NPM-inspired reforms of the famous Danish labour market policy illustrated by measurement and organizational recalibration in the employment system”, CARMA, Aalborg University, Denmark, Paper for the conference “Welfare States in Transition: Social Policy Transformation in Organizational Practice”, Chicago, 15-16, May 2009, p. 15.

<sup>14</sup> R. Blanpain, *European Labour Law*, Kluwer Law International, 2010, p. 141.

<sup>15</sup> E. Medeiros, *Uncovering the Territorial Dimension of European Union Cohesion Policy*, Routledge, 2017.

<sup>16</sup> R. Sapienza, “La politica comunitaria di coesione economica e sociale come sistema di Multi-level Governance” in R. Sapienza (ed.), *Politica comunitaria di coesione economica e sociale e programmazione economica regionale*, Giuffrè, 2003, p. 1, 4. The European Commission has also been central in promoting the *depoliticising factor*, i.e. in trying to avoid political compromise in resources allocation: L. Hooghe, *Cohesion Policy and European Integration. Building Multi-level Governance*, Oxford University Press, 1996.

<sup>17</sup> Dublin European Council, 13 and 14 December 1996, Presidency Conclusions.

social actors, non-profit organizations, schools, and universities, etc., and began to function as an integrated, coordinated and innovative strategy in order to address unemployment.<sup>18</sup>

According to the Council, the territorial dimension of the cohesion policy lies in its “capacity to adapt to the particular needs and characteristics of specific geographical challenges and opportunities”.<sup>19</sup> For this reason, the development of high-quality partnerships, within a comprehensive strategy pursuing specific objectives and actions, is essential. Hence, the territorial aspect is directly linked to the need to coordinate between local actors and the territorial, domestic and European levels. The emphasis on the territorial level was also reaffirmed in the middle of the last (still current for some MSs) economic crisis: on the one hand, the Council highlighted the role of cohesion policy and structural funds as “important delivery mechanisms to achieve the priorities of smart, sustainable and inclusive growth in MSs and regions”<sup>20</sup>, while, on the other hand, the Commission found that an effective implementation of Europe 2020 would require a governance system that “links the EU, national, regional and local levels of administration” and “within this context, the role of local development approaches under cohesion policy should be reinforced”.<sup>21</sup> Thus, European financial resources are to be targeted toward clear objectives, supporting the promotion of partnerships and the involvement of local and regional stakeholders, social partners, and civil society.<sup>22</sup> In particular, European Funds, especially the European Social Fund, are vital in directing social policies aimed at active and social inclusion.<sup>23</sup> Moreover, economic, social and territorial cohesion

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<sup>18</sup> Commissione Europea, L’occupazione al primo posto, *Panoramica sui patti territoriali per l’occupazione in Italia*, Ufficio delle pubblicazioni ufficiali delle Comunità europee, Lussemburgo, 1999.

<sup>19</sup> Council Decision of 6 October 2006 on Community strategic guidelines on cohesion (2006/702/EC).

<sup>20</sup> Council Decision of 21 October 2010 on guidelines for the employment policies of the Member States (2010/707/EU). “In its conclusions of 17 June 2010, the European Council stressed the importance of promoting economic, social and territorial cohesion in order to contribute to the success of the new Europe 2020 strategy”. Please, see E. Marlier, D. Natali, R. Van Dam, *Europe 2020: Toward a More Social EU?*, P.I.E. Peter Lang S.A., 2010.

<sup>21</sup> Brussels, 9.11.2010 COM (2010) 642 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, The Committee of the Regions and the European Investment Bank, Conclusions of the fifth report on economic, social and territorial cohesion: the future of cohesion policy

<sup>22</sup> D. Strazzari, “La progressiva interrelazione tra le politiche di coesione e la Strategia Europea per l’occupazione. segnali di un federalismo competitivo europeo?” in E. Ales, M. Barbera, F. Guarriello (ed.), *Lavoro, welfare e democrazia deliberative*, Giuffrè, 2010, p. 654.

<sup>23</sup> A. Alaimo, “Presente e futuro del modello sociale europeo. Lavoro, investimenti sociali e politiche di coesione”, *Rivista del Diritto e della Sicurezza Sociale*, Vol. 2, 2013, pp. 253 ff., pp. 272-274.

may be achieved through specific actions,<sup>24</sup> for example, the creation of specific legal instruments to support workers in their transitions into the LM.<sup>25</sup>

The idea of C&C with several actors was also included in the new definition of corporate social responsibility as “the responsibility of enterprises for their impacts on society”.<sup>26</sup> Companies are to “have in place a process to integrate social, environmental, ethical, human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders”.<sup>27</sup> The Commission sought to promote dialogue with enterprises and other stakeholders on issues such as employability, demographic change and active ageing, and workplace challenges, and expected companies to help mitigate the social effects of the current economic crisis, including job losses.<sup>28</sup>

In the context of LM C&C, the proposal of 2014 on the creation of a European Platform sought to enhance cooperation in the prevention and deterrence of undeclared work.<sup>29</sup> Having explained that the main responsibility for tackling undeclared work lies with the MSs, the Commission identified three specific types of enforcement bodies, clarifying that responsibility rests with these specific actors. Meanwhile, targeted policies and the improvement and coordination of inspection practices are given priority. The main goal of the document is the reduction of incentives for employers to utilise undeclared work, and for workers to engage in such activities. Useful exchange experiences have already taken place in this field, either in the context of the Mutual Learning Programme under the

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<sup>24</sup> Art. 175 TEUF

<sup>25</sup> E. Ales, “Dalla politica sociale europea alla politica europea di coesione economica e sociale. Considerazioni critiche sugli sviluppi del modello sociale europeo nella stagione del metodo aperto di coordinamento”, *Working Paper C.S.D.L.E. “M. D’Antona”*, No. 51, 2007, p. 38.

<sup>26</sup> Brussels, 25.10.2011 COM (2011) 681 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, The Committee of the Regions: A renewed EU strategy 2011-14 for Corporate Social Responsibility.

<sup>27</sup> Brussels, 25.10.2011 COM (2011) 681 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, The Committee of the Regions: A renewed EU strategy 2011-14 for Corporate Social Responsibility.

<sup>28</sup> This trend toward an active companies’ contribution to social concerns could be highlighted in particular since the Green Paper ‘Promoting a European framework for Corporate Social Responsibility’, Brussels, 18.7.2001 COM(2001) 366 final. Please see: C. Barnard, S. Deakin, “Reinventing the European corporation? Corporate governance, social policy and the single market”, *Industrial Relations Journal*, Vol. 33, Iss. 5, 2002, p. 495.

<sup>29</sup> Proposal for a Decision of the European Parliament and of the Council on establishing a European Platform to enhance cooperation in the prevention and deterrence of undeclared work, COM (2014) 221 final.

European Employment Strategy, or as a part of multilateral projects. However, with regard to voluntary multilateral cooperation, not all MSs have participated in these initiatives. It is evident, therefore, that such proposals work effectively when participants believe in the merits of the project and thus actively cooperate to carry out it.

The 2014 proposal also led to the Decision of the European Parliament and the Council of 9 March 2016, which established a European Platform to enhance cooperation in tackling undeclared work ((EU) 2016/344).

### 3. Italian C&C-networks

With regard to Italy, the concepts of C&C between LM actors have been supported by recent legislation.

#### *a) Databases as tools of coordination and cooperation*

Common databases are seen as useful tools for achieving efficient coordination between active and passive LMPs and for interlinking PESs, local administrations, the Ministry of Labour and Social Policy, and the National Social Security Institute (INPS)<sup>30</sup>.

Technological integration among different actors in the LM has been a goal of the State for a long time. In particular, legislation has established the creation of the *Sistema Informativo del Lavoro* (Informative Labour System, SIL), of the *Borsa Continua Nazionale del Lavoro* (National Employment Exchange), and of several databases of the INPS<sup>31</sup>.

Law Decree n. 185/2008 provided for the signing of agreements between INPS and *enti bilaterali*,<sup>32</sup> non-profit entities composed of social partners and charged with the provision of services to their subscribers (employers and employees). These agreements may regulate information exchange in order to interconnect services/supports with activation policies and vocational training.

The Directive of 10 February 2009 of the Ministry of Labour and Social Policy established the creation of a database of beneficiaries of unemployment benefits and other subsidies, in order to enhance matching of job offers to available job places. This database must be accessible to INPS

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<sup>30</sup> D. Gilli, R. Landi, "Potenziamento dei sussidi di disoccupazione e organizzazione dei servizi per il lavoro", *Diritto delle relazioni industriali*, Vol. 2, 2008, pp. 320 ff.

<sup>31</sup> S. Pirrone, P. Sestito, "Mercato del lavoro, sistemi di protezione sociale, libertà di iniziativa economica privata. Dal collocamento ai servizi per l'impiego: dieci anni di evoluzione normativa per una riforma incompiuta", *Diritto delle relazioni industriali*, Vol. 3, 2006, pp. 611 ff.

<sup>32</sup> "Bilateral entities."

and to PES.<sup>33</sup> Another database created by the *Casellario dell'assistenza*<sup>34</sup> law contains information on assistance subsidies granted to citizens, and seeks to increase the efficiency with which financial resources are managed. Recently, Law n. 92/2012,<sup>35</sup> created two kinds of database: (i) anonymous databases, to facilitate studies, analyses, etc. of the LM situation; and (ii) a database in the INPS, integrating information from other actors, aimed at controlling both the amount/duration of unemployment benefits actually used by beneficiaries, and the services that the PESs provide. Furthermore, Law Decree n. 76/2013, converted into Law n. 99/2013, introduced another database, the *Banca Dati delle Politiche Attive e Passive* (Art. 8), or “database of active and passive policies”, which aimed at streamlining activation initiatives, implementing the Youth Guarantee<sup>36</sup>, and overhauling the evaluation system introduced by the Fornero Reform<sup>37</sup>. Several other existing databases converged into this new one.

As will be discussed in more detail, below, the 2015 Renzi reform created a new agency for activation policies, as well as a new database administered by same. This new database incorporates previous databases and further data on the effects of active and passive LM policies. Thus, on the one hand, the Italian legislature has supported the creation of common databases in order to improve their advancement in achieving efficient LMPs, while, on the other hand, it is also evident that the body of legislation in the field is stratified, with questionable outcomes in terms of efficiency.

In the context of networking, also worth mentioning is the *Sistema informativo nazionale della prevenzione* (SINP), which is designed to integrate several databases and to be accessible to specific actors in the field of diseases and work-related injury prevention measures/interventions.

However, the aforementioned databases are yet to be fully established: an important problem is the lack of communication and integration between the IT systems of the different LM subjects involved. Further, regional differences – especially the differences between northern and southern Regions – complicate the feasibility of coordination.<sup>38</sup> Moreover, the Regions have developed their own databases, often not linked to the national

<sup>33</sup> M. Tiraboschi, S. Spattini, J. Tschöll, *Guida pratica ai nuovi ammortizzatori sociali*, Il Sole 24 Ore, 2010; D. Garofalo, *Gli ammortizzatori sociali in deroga*, Ipsoa, 2010, p. 111.

<sup>34</sup> Law Decree n. 78/10, *Misure urgenti in materia di stabilizzazione finanziaria e di competitività economica*, art. 13.

<sup>35</sup> Fornero Reform, from the name of the minister of labour at the time.

<sup>36</sup> Council Recommendation of 22 April 2013 on establishing a Youth Guarantee (2013/C 120/01).

<sup>37</sup> M. Marocco, “La doppia anima delle politiche attive del lavoro e la Riforma Fornero”, *Working Paper CSDLE “Massimo D’Antona”*, No. 192, 2013.

<sup>38</sup> G. Baronio, M. Marocco, “Il caso dei “Centri Integrati per l’Impiego”: le prospettive di costruzione di un sistema integrato di politiche attive e passive in Italia”, *Collana Studi Isfol*, Vol. 3, 2008.

ones, while meanwhile, at a national level, database operators are often reluctant to provide information to external actors.

**b) Coordination and cooperation: normative attempts**

Law n. 92/2012 provided for the creation of specific C&C networks at the territorial level (the *reti territoriali*)<sup>39</sup>, probably both to provide a legal framework for actors already engaged in networking, and to encourage those territories in which these kinds of network had never been established. The *reti territoriali* sought to integrate education, vocational training and job services, in order to contribute to the realisation of growth strategies, youth employment, and welfare reforms, etc.

Despite the promotion of a bottom-up approach in the LM, this regulation was unable to create effective changes in the Italian framework. This was due to the vague enunciation of goals to be achieved, which did not specify the meaning of “growth strategies”, “welfare reforms”, etc.<sup>40</sup>

The Law Decree n. 76/2013, converted into the Law n. 99/2013, introduced a specific entity – the *Struttura di Missione* – that was to propose guidelines and, later, initiatives to integrate different IT systems, in order to improve the efficiency of the *Banca Dati delle Politiche Attive e Passive* (Law n. 99/2013). The *Struttura di Missione* was to link different relevant public actors at a national level – such as the ministry of labour and social policy, the INPS, national technical agencies (ISFOL and Italia Lavoro), etc. – together with regional and local public entities, such as *Regioni* and *Province Autonome*. This network was designed, for the first time, to provide an opportunity to coordinate different actors playing relevant roles at different levels in the LM and, while also respecting the relationship between the domestic and regional/local levels. However, with the Renzi Government, a new centralized approach has been adopted<sup>41</sup> and the work of the *Struttura di Missione* has been suspended.

The Renzi reform, through Legislative Decree n. 150/2015, introduced important changes in the field of active LM policies, such as the creation of a new Agency, the National Agency for Activation policies (*Agenzia Nazionale per le Politiche Attive del Lavoro*, ANPAL). This Agency seeks to coordinate the active LM policies in all the national territory and, specifically, coordinate a service network for employment policies.<sup>42</sup> This

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<sup>39</sup> Art. 4, par. 55, Law n. 92/2012.

<sup>40</sup> T. Bazzani, “*Rete e problema occupazionale: i recenti interventi normativi*”, *Diritti Lavori Mercati*, Vol. 2, 2014, p. 403.

<sup>41</sup> P. A. Varesi, “Politiche attive del lavoro e servizi per l’impiego: la perdurante necessità di costruire reti locali tra istituzioni competenti e stakeholders” in T. Bazzani, D. Gottardi (ed.), *Il coordinamento degli attori del mercato del lavoro*, Ed. Scientifiche Italiane, 2015.

<sup>42</sup> Legislative Decree n. 150/2015.



network is made up of several private entities, such as social partners and public actors, as well as regional structures, the INPS, the National Institute of work insurance (INAIL), PESs,<sup>43</sup> inter-professional vocational training funds, bilateral entities, Italia Lavoro,<sup>44</sup> the network of chambers of commerce, industry, handicraft and agriculture, universities, intermediate schools, and, of course, the ANPAL.

In addition to the aforementioned examples of C&C, all of which are operated under the supervision of public administrations, C&C in labour law may also include the promotion of industrial districts by social partners, supporting local development through collective agreements at the territorial level.<sup>45</sup>

#### 4. The territorial workfare project

Having painted a picture of the broader legislative framework, I shall now turn our attention to a case, at the territorial level, in which different LM actors have decided to work together to improve some aspects of the LM system.

The Territorial Workfare Project is funded by the University of Verona and by two local “bilateral entities”, the *Ente bilaterale del Commercio*, in the trade sector, and the *Cassa edile*, in the building sector. The project promotes a network of several public and private actors in the local LM. The collaboration between these entities has been focused on the mapping of local initiatives in passive and active LMPs. The research team analysed the relationship between local passive initiatives, such as special local

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<sup>43</sup> On the PES in Italy: F. Liso, “Brevi appunti sugli ammortizzatori e sui servizi all’impiego nel Protocollo del 23 luglio 2007,” in A. Perulli (ed.), *Le riforme del lavoro. Dalla legge finanziaria 2007 al protocollo sul Welfare*, Halley Editrice, 2007, which describes the situation of the employment agencies as a patchworked situation, in particular p. 113. For a deeper analysis see also A. Alaimo, *Il diritto sociale al lavoro nei mercati integrati. I servizi per l’impiego tra regione comunitaria e nazionale*, Giappichelli, 2009; F. Liso, “Servizi all’impiego,” *Enciclopedia Giuridica Treccani*, 2007, p. 1–10; F. Liso, “Appunti sulla trasformazione del collocamento da funzione pubblica a servizio,” in R. De Luca Tamajio, M. Rusciano, L. Zoppoli (eds.), *Mercato del lavoro: riforma e vincoli di sistema*, Editoriale scientifica, 2004; F. Liso, “I servizi all’impiego,” in D. Garofalo, M. Ricci, *Percorsi di diritto del lavoro*, Cacucci, 2006; F. Liso, “Collocamento. I) Diritto del lavoro (voce; aggiornamento),” *Enciclopedia Giuridica Treccani*, 1988, p. 1–24.

<sup>44</sup> *Italia Lavoro* is a subsidiary company, entirely held by the Italian Ministry of Economy and Finance. *Italia Lavoro* works for the Ministry of Labour and Social Policy and promotes initiatives in the field of employment policies and social inclusion. *Italia Lavoro* became *ANPAL Servizi S.p.A.* from December 2016 (Law 11 December 2016, n. 232).

<sup>45</sup> G. Villa, “Reti di imprese e contratto plurilaterale”, *Giurisprudenza commercial*, Vol. 1, 2010, pp. 944 ff.; T. Treu, “Trasformazioni delle imprese: reti di imprese e regolazione del lavoro”, *Mercato Concorrenza Regole*, Vol. 1, 2012, p. 7 ff.

unemployment benefits, subsidies, etc., and activation duties. The research project has focused on the initiatives promoted at the local level in order to support unemployed people in their transition to a job, highlighting: (i) sources of financing; (ii) requirements for accessing to the initiatives; (iii) relationships with other actors in promoting initiatives; and (iv) whether initiatives are conditional upon activation duties; etc.

Important achievements of the research concern: (a) the interest shown by the actors in other participants' initiatives and willingness to collaborate on common projects; (b) a mutual acknowledgment of the scarcity of financial resources; and (c) the involvement of private resources in specific projects. In some cases, these private actors played a role as a mere sponsor, while in other cases they also acted as planners or managers of projects. The most important example concerns a bank foundation that provided a local PES with €1.5m over three years in order to create special subsidies. These were linked to activation measures for specific categories of unemployed people. Such benefits integrated the national social security system, providing protection for people otherwise without support.

LM actors highlighted the need for a common database: problems such as different IT systems, different classifications of data, lack of resources, and inadequate legislation, etc., did not allow this goal to be achieved.

Regarding the role of the LM actors involved, the project showed that PESs and bilateral entities play a pivotal role in C&C activities; nevertheless, social partners didn't make as important a contribution as policy makers in respect of LMPs. Indeed, social partners had already signed a territorial agreement for development and growth, but the stated aims of the agreement proved to be unsupported by the will of the signatories in practice.

With regard to job matching, one of the programme's main inefficiency issues was considered to be the lack of relationships between the PES and a significant number of companies. This became a reason for a further project, aimed at trialling a C&C-network between the participants of the "territorial workfare project", additional actors, and three companies of significance at the local level (Auchan, Berner, and Quarella). This second project sought to facilitate the companies' business development, to produce new and/or better employment, and to promote projects oriented toward developing local employment. Through an analysis of specific business needs, the research: 1) recognised several players active at the local level, in order to make them collaborate with each other and with the three companies; 2) studied the possible development of C&C between the three companies and local partners; and 3) encouraged a useful collaboration between them. In particular, the project focused on: a) employment services addressed to firms (vocational guidance, vocational training, information about job regulations for job seekers, information about job regulations and law procedures related to recruitment, and the promotion of internships, etc.); b) the possible

promotion of clusters between firms involved in the project; and c) coordination, where possible, between local policies and companies' needs through companies' associations.

Interesting outcomes were achieved by this project, such as agreements between PESs and companies in order to enable PESs to select employees for companies with reference to the professional profiles they requested, which were then able to be matched to those of unemployed people. The PESs were able to propose to unemployed people that they participate in tailored courses and vocational training in order to achieve an adequate and suitable professional profile. At the same time, representatives of these PESs visited companies to gain understanding of the specific duties and functions associated with each job.

Further initiatives were also agreed between companies and bilateral entities in order to promote commercial relationships with mutual interests. Moreover, companies have begun to think about promoting possible clusters, through which common economic advantages and skills may be achieved.

## **5. Conclusions**

Coordination and cooperation are two concepts that may be applied to actors in the LM in order to make the LM more efficient and more sustainable, from both an economic and a social point of view.

In particular, C&C between LM actors should be considered an opportunity to reach clear policy objectives, a way to enhance the sustainability of social protection systems, and a means of guaranteeing adequate protection for unemployed people. Thus, networks in the LM should be able to go beyond their formal objectives and actually make substantive achievements.

Indeed, C&C that is limited to the achievement of mere formal objectives – i.e. benchmarking without reference to real employment policy goals – may run the risk of becoming a bureaucratic system used by entities to legitimate their existence and, moreover, may also encourage the loss of responsibility in policymaking.

Looking at the extreme consequences of the bureaucratization, Hannah Arendt asserted that “in a fully developed bureaucracy there is nobody left with whom one could argue, to whom one could present grievances, on whom the pressures of power could be exerted”.<sup>46</sup> The division of a process into small parts may render a person involved in the process responsible only for the small part he/she works with, and progressively less and less responsible for the outcomes of the process in their entirety.

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<sup>46</sup> H. Arendt, “A Special Supplement: Reflections on Violence”, *The New York Review*, February 27, 1969. Please, see <http://www.nybooks.com/>

For Max Weber, the “*stahlhartes Gehäuse*”, or “iron cage”, traps individuals in systems based purely on efficiency, rational calculation, and control. Bureaucratization permits the calculation of advantages and disadvantages, but is nevertheless unable to justly handle individual cases. Thus, the rationalization of a society brings about its depersonalization. Weber believed that societies could progress toward either a *zweckrational*, i.e. social action based on bureaucracy, or a *wertrational*, i.e. social action oriented toward ethical goals, using rational and efficient means to achieve these.<sup>47</sup>

In this light, the bureaucratization brought about by C&C initiatives may be avoided by promoting the involvement of LM actors in projects in which they discuss and share common goals, and in which they relate to each other proactively. Thus, social partners may play a pivotal role, so long as institutions support and promote their activities.

Going forward, C&C may also prove strategic in the development of active LM policies at the EU level, i.e. activation initiatives linked to the possible introduction of a European Unemployment Benefit Scheme.<sup>48</sup> Moreover, C&C may prove valuable in the implementation of the Pillar of Social Rights, buttressed by the proactive involvement of social partners.

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<sup>47</sup> M. Weber, *Economy and society*, University of California Press, 1978.

<sup>48</sup> R. Repasi, “Legal Options and Limits for the Establishment of a European Unemployment Benefit Scheme”, EU Commission, DG for Employment, Social Affairs and Inclusion, 2017.